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Supreme Court, U.S.
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NO._____

IN THE
# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1991

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**ALIMADAD JATOI,**
**ALCINA F. JATOI**
**PETITIONERS**

**V.**

**AMEGA CONSTRUCTION COMPANY, ET AL.**
**RESPONDENTS**

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# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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ALIMADAD JATOI
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## QUESTIONS PRESENTED

### I.

1. WHETHER THE DISTRICT COURT IMPERMISSIBLY COERCED, OR IMPERMISSIBLY CONTRIBUTED TO THE COERCION OF THE PETITIONER IN SETTLEMENT OF THE CASE.

2. WHETHER THE DISTRICT COURT ERRED IN DENYING PETITIONER'S RULE 59 MOTION FOR A NEW TRIAL OR TO ALTER OR AMEND THE JUDGMENT WHEN IT WAS IMMEDIATELY BROUGHT TO THE DISTRICT'S COURT'S ATTENTION THAT THE PETITIONER'S SETTLEMENT WAS NOT VOLUNTARY.

3. WHETHER DENIAL OF PETITIONERS RULE 60(B) MOTIONS WAS ERROR.

4. WHETHER PETITIONER ALCINA F. JATOI HAD HER TEXAS COMMUNITY PROPERTY RIGHTS VIOLATED SINCE SHE DID NOT APPROVE OF THE SETTLEMENT OR PARTICIPATE IN THE COURT SETTLEMENT HEARING.

5. WHETHER THE SANCTIONS VIOLATED PETITIONERS CONSTITUTIONAL RIGHTS AND WERE NECESSARY OR APPROPRIATE.

## PARTIES

Alimadad Jatoi, Petitioner
Alcina F. Jatoi, Petitioner
Amega Construction, Inc., Respondent
Aetna Insurance Company, Respondent
Benedict Industries, Inc., Respondent
Pioneer Concrete of Texas, Inc.,
Respondent

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Alimadad Jatoi and Alcina F. Jatoi petitions for a hearing of this petition for a *writ of certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

## OPINIONS BELOW

The judgment of the Court of Appeals was issued on August 23, 1991 affirming the judgment of the District Court. (Appendix A). The Court of Appeals denied Petitioner Alimadad Jatoi Rule 60 (b) appeal on June 30, 1992 (Appendix B) and on July 21, 1992 (Appendix C). The Court of Appeals dismissed Petitioner Alcina F. Jatoi Rule 60 (b) appeal on April 23, 1992 (Appendix D). The Order [the District Court issued no Judgment] of the District Court was issued on November 8, 1990. (Appendix E). The District Court denied Petitioner Alimadad Jatoi's Rule 60 (b) motion on August 8, 1991. (Appendix F). The District Court denied Petitioner Alcina F. Jatoi's Rule 60 (b) motion on December 18, 1991. (Appendix G).

## JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under its review authority and under Rule 60 (b). The dates of the judgments sought

to be reviewed are August 23, 1991, June 30, 1992, July 21, 1992 and April 23, 1992.

## APPLICABLE FEDERAL QUESTIONS

**1. WHETHER THE DISTRICT COURT IMPERMISSIBLY COERCED, OR IMPERMISSIBLY CONTRIBUTED TO THE COERCION OF THE PETITIONER ALIMADAD JATOI IN SETTLEMENT OF THE CASE.**

**2. WHETHER THE DISTRICT COURT ERRED IN DENYING PETITIONERS RULE 59 MOTION FOR A NEW TRIAL OR TO ALTER OR AMEND THE JUDGMENT WHEN IT WAS IMMEDIATELY BROUGHT TO THE DISTRICT COURT'S ATTENTION THAT THE PETITIONER'S SETTLEMENT WAS NOT VOLUNTARY.**

3. WHETHER DENIAL OF PETITIONERS RULE 60(B) MOTIONS WAS ERROR.

4. WHETHER PETITIONER ALCINA F. JATOI HAD HER TEXAS COMMUNITY PROPERTY RIGHTS VIOLATED SINCE SHE DID NOT APPROVE OF THE SETTLEMENT OR PARTICIPATE IN THE COURT SETTLEMENT HEARING.

5. WHETHER THE SANCTIONS VIOLATED PETITIONERS CONSTITUTIONAL RIGHTS AND WERE NECESSARY OR APPROPRIATE.

## STATEMENT

**The government of the United States through the Declaration of Independence, the Constitution of the United States, and Amendments thereof has a covenant with its citizens, domestic or foreign born, that it will provide them with due process of law, and protect their rights under the constitution and common law, and see to it that liberty, pursuit of happiness and their property are not taken away from them, without due process of law.**

This petition concerns a lawsuit which was filed by Amega Construction Company against the Petitioners and an entity called Jatoi Partnership on July 26, 1985, in the 236th District Court of Tarrant County, Texas. The case was removed to the federal system and went to trial on November 5, 1990.

The case was terminated by a settlement in the U. S. District Court in the Northern

District of Texas, at Fort Worth, Texas on November 7, 1990, at 8:30 p. m., after a very brief jury trial. The settlement gave Amega Construction Company in excess of $1.1 million (one point, one million dollars) over and beyond the total contracted price of $3.4 million (three point, four million dollars). Additionally, Aetna Insurance Company, which had provided a performance and labor and materialman bond to Petitioners and paid for by Petitioners received $100,000 in attorney fees. Petitioners paid for their court costs.

The Counterclaim of the Petitioners against Amega Construction Company and Aetna Insurance Company was never tried.

This petition questions the fairness of this settlement.

This petition also questions the legality of the way in which this settlement was arrived at and obtained.

## REASONS FOR GRANTING THE WRIT

The Petitioners humbly seek the opinion of the Supreme Court if the trial held in the U. S. District Court in Fort Worth, Texas, meets the criteria for a fair and impartial trial under the constitutional requirements of due process as a whole.

The Petitioners also humbly seek the opinion of this court, as to the role of an attorney visa vis his client during a trial, and alternatives left to the client, if any, after the client's attorney has abandoned him and made a settlement on his behalf without proper authority and after misrepresentations to his client to preserve himself.

The Petitioners also humbly seek the opinion of this court to determine if the U.S. District Judge acted fairly and justly, not only in the trial as a whole, but in the part he played in the settlement process.

The petitioners humbly request this court to determine if the U. S. District

judge's warning of criminal prosecution, and his advice to the Petitioner Alimadad Jatoi concerning the 5th Amendment, was in fact intended not to preserve Petitioner's constitutional rights, but in fact was intended to coerce him with an unjust and unfair settlement, through and by Petitioners' attorney. Further, Petitioners humbly request the opinion of this court to determine if the atmosphere in this trial was conducive to a fair and impartial trial and not coercive.

The Petitioners also humbly request the opinion of this court to determine if they were not effectively deprived of representation of their attorney in this trial by the actions of the U. S. District Judge. And having been so, the Judge used the same attorney to coerce a settlement from only one of the Petitioners.

The Petitioners have been denied a hearing at the U. S. District Court level by the same trial Judge, and in this particular instance when a serious doubt has been raised, and is being raised, as to his role in an unfair settlement.

The Petitioners have been rejected twice in their appeals to the Fifth Circuit Court of Appeals. In their last opinion, the 5th Circuit has penalized the Petitioners, and, apparently are trying to intimidate Petitioners and their attorney. The reasons given, as Petitioners understand, are that the courts have no time to look at civil cases, and use of judicial resources in civil cases is restricted. Economics and taxpayers' money are cited as other reasons to restrict proper determination of facts in the civil justice system. It appears to the Petitioners, that to deprive citizens of their property without due process of law is no longer being considered as an important constitutional right as it is embodied in the U. S. Constitution. The 5th Amendment states "...nor be deprived of life, liberty or property without due process of law."

Petitioners point out that it appears as though the appellate court has basically relied on the brief submitted by Amega Construction Company. Amega's brief is **NOT ACCURATE**, and **MISQUOTES**

**THE RECORD,** both in its content and **SEQUENCE OF EVENTS.**

The Opinion of the 5th Circuit Court of Appeals takes certain paragraphs out of context, and out of sequence, and assumes the U. S. District Judge's role in this trial was not improper.

The Petitioners also humbly seek the opinion of this court to determine if the remarks of the appellate judges are warranted or unwarranted, and whether their penalties as imposed are proper under the circumstances.

## THE FUNDS IN THE REGISTRY OF THE COURT -- HOW THEY GOT THERE AND THEIR OWNERSHIP

It is important to understand how the monies got into the court registry.

1. Amega's attorney arranged for the Performance Bond to be secured, but he did not provide the original to Petitioners, nor did he record it at the Tarrant County courthouse.

2. Amega Construction filed its lawsuit in July of 1985 against Petitioners.

3. Amega Construction Company filed questionable liens on their own behalf and upon behalf of their sub-contractors. And Amega claimed to have a first priority lien, even though they new or should have known that they did not.

District Judge Eldon B. Mahon, who first handled the case prior to his leaving the bench, in a footnote to his Order of April 15, 1988 [where he determined that all cases should be withdrawn from the Bankruptcy Court to the Federal District Court] that the only issue that was not withdrawn to the District Court was the dispute over the lien priority between Fort Worth Title Company and Amega Construction.

Judge Mahon stated:

"Based upon the limited record before the Court, it seems that Guaranty Federal Savings' lien is prior to Amega's lien. If this is true, the Court expects the parties to resolve this issue without further expense to

the clients and without further use of judicial resources.

The Court need not remind the competent and learned counsel in this case of the salutary effect of Rule 11 of the Federal Rules of Civil Procedure which requires counsel to have a good faith belief in the assertions prior to presenting such to the Court. Extensive discovery has taken place in these proceedings and the Court expects that all assertions are based upon sound factual support."

At the time of Judge Mahon's Order 53 depositions, including that of nine experts had been completed by the parties.

4. Amega's sub-contractor liens resulted in the Petitioners having to provide triple the monies required for the Permanent Loan to be closed.

5. Amega Construction claimed priority liens. The total amount of liens filed against the property by Amega Construction and its sub-contractors amounted to $1.4 million dollars, even though the total amount of money owed to

Amega Construction was in the amount of less than $300,000.00.

The total amount due to Amega Construction after all the subcontractors had been paid and all the credits given the Petitioners was the total sum of $277, 399.84. (*See* Appendix H for how this figure is determined.) For the purposes of this evaluation the Petitioners have used the last draw and contract documents.

The Disbursement Record of funds from the Registry of the Court are submitted as part of Appendix H.

In the final analysis, it can be seen that Amega Construction received $1.1 million dollars in addition to their contract price of $3.4 million dollars.

6. Since the Performance Bond was not available because of it not be recorded by Amega's attorney it was not possible to close the Permanent Loan with first priority lien being given to Guaranty Federal Savings and Loan.

7. As a result Petitioners were forced to sell a 25% interest in the property to Guaranty Federal Savings and Loan in

order to raise the funds necessary to close the Permanent Loan.

In July 1988, by agreed order, the District Court recognized that Amega Construction had withdrawn their priority lien.

Since Fort Worth Title Company, in the opinion of the Petitioners, had mismanaged the funds, Petitioners filed a claim against Fort Worth Title Company.

Fort Worth Title Company instead of returning the funds to the Petitioners, who were the rightful owners of the funds, placed the funds in the Registry of the Court. The funds in the Registry of the Court were not placed their for the benefit of Amega Construction .

The funds in the Registry of the Court were the community property of Alimadad Jatoi and Alcina F. Jatoi.

Judge McBryde dismissed Petitioners claim against Fort Worth Title Company without the consent of Alcina F. Jatoi, and with the coerced consent of Alimadad Jatoi.

## PETITIONERS ABANDONMENT BY HIS COUNSEL

The record in the district court demonstrates that during the trial, Petitioner's counsel virtually abandoned his clients, leaving them without the effective assistance of counsel, especially when it came to the issue of settlement. The following summary of the transcript at trial highlights counsel's movement from representing Petitioners to representing himself.

1. Throughout the trial the District Judge routinely interjected himself into the proceedings to cut off anything that could remotely be described as repetitive or cumulative. (TR. Vol. II, pgs. 33-34) [Petitioner's attorney admonished (during cross of an adverse party) that he could not restate a critical question that appears designed to test the witness' understanding of a critical matter.]; (Tr. Vol II -95) (Court admonishes counsel regarding repetitiveness although the Court is not certain the matter has been covered); (TR.

Vol. II -133) (Court informs counsel that at their peril they must recall every single question previously asked, as well as its answer, or the examination of that witness ends); (TR. Vol II - 238-39) (The Court terminates reading of a deposition because the answer to a deposition question, about the first meeting of the witness with Alimadad Jatoi, includes mention of a trailer on Petitioners property which had been mentioned before). The Court also cut off testimony for alleged repetition even where it involved counsel's attempt to cross-examine an adverse witness to cut back the broad scope of his harmful testimony on an important issue. *See*, TR. Vol. III - 69 where Petitioner's attorney is cut off in the middle of cross examination as he appears to be preparing to impeach the witness. The effect of the Court's actions set out above on Petitioner's counsel was to intimidate him, and this intimidation was demonstrably evident at trial.

On the third day of testimony, the Court completely intimidated Petitioner's counsel by threatening him with contempt. As

Petitioner's attorney attempted to control a witness on cross-examination, he stated "Don't look at [opposing counsel]". The Court immediately stopped the proceedings, removed the jury and informed Petitioner's attorney that he was "going to withhold ruling at this time on whether [Petitioner's attorney] was in contempt of Court." (TR. Vol III - 104). The District Judge then informed Petitioner's attorney that he "...may not be so lucky the next time."

The net effect of this final dressing down by the District Court was to render Petitioner's attorney almost extraneous to Petitioner's case. This plainly comes through in the reading of the entire transcript. Indeed, by Vol. III, p. 168 of the transcript it is evident that Petitioner's attorney has moved from representing Petitioners to self preservation. Ten pages later, at pp. 179-80, it is clear that a serious conflict has developed between Petitioners and their attorney, and on pg. 180, the record shows Petitioner's counsel virtually abandoning Petitioner Alimadad Jatoi to a

former attorney, Mr. Trickey, who is present as a witness.

Since Petitioner Alimadad Jatoi is now painfully aware that his attorney either cannot or will not speak for him, he makes the following statement on the record at TR. Vol. III, pp. 180-81:

> Your Honor, as you know, I have been in this Court through the proceedings. I haven't missed a minute. Nowhere I have found the actual contract documents that Amega prepared and signed with me its terms have been discussed yet, [Sic]. Some of the items that were discussed that give certain advice within that contract document I have been told by my attorney are being excluded from the Court, [sic] and those were the basic terms on which I based my case on.
>
> If they have already been excluded and the contract has never been looked at and my witness and attorney at that time, Mr. Trickey,

> who helped me to frame and advise to sign that contract [sic] have not even been consulted, I told my attorney I don't think that I am being properly examined or brought before the jury.

Then Petitioner Jatoi, in an exchange with the Court at TR. Vol III - 185, clearly states that he cannot settle this case regardless and states why.

THE COURT: Now, let me suggest this to you, Dr. Jatoi: My understanding is that an offer that sounds to me like a very generous settlement offer has been made to you, and I am going to give you and your attorney ten minutes to evaluate whether or not you want to accept that settlement offer.

If the decision is that you don't want to accept it, then we will go on with the trial and I will allow your attorney to put in any legitimate evidence. I will, as I have before, rule on what I consider to be improper evidence and exclude it from the jury.

So if you want to explore that with your attorneys -- and there is nothing wrong with it.

The Court then goes on to state, after a response by Petitioner, "...and as you know, the parties have the right to withdraw a settlement offer at any time. And if you decline the settlement offer at this time, then you may not have another opportunity. And I understand it is a very generous offer that has been made to you." Petitioner Alimadad Jatoi clearly replies "...**I hope you will forgive me for saying this ... that there's no way that I can accept that offer because I am left with virtually nothing after that, anyhow.**" (That actual offer was $250,000.00 and the Court later expresses surprise (TR. Vol III-330) that Petitioner is accepting $150,000.00).

At TR. Vol. III - 285, the record illustrates how intimidated by the Judge Petitioner's attorney has now become. At

this point in the proceeding Petitioner Alimadad Jatoi is forced to proceed by narrative rather than response to questions in order to try and lay the foundation to establish that the Denson drawings which had been excluded under the parole evidence rule were, in fact part of the contract and identified as such in the contract.

The actual settlement offer which had been transmitted to Petitioner Alimadad Jatoi prior to the time it was brought up before the District Court was an offer to give him $250,000.00 of the funds in the registry of the Court. This settlement offer would pay $1,000.000.00 to Amega Construction. Petitioner rejected this offer for two reason: First, it would take nearly all the funds in the registry of the Court, if even that would be enough, to add the square feet necessary to bring the building up to the specifications required by the contract and give it the value necessary to make ti cash flow as a business proposition, whether as a medical facility or otherwise. Two

hundred and fifty thousand dollars ($250,000.00) would have left Petitioners Jatoi with nothing, especially, after paying attorneys' fees. Second, under the contract as signed with all of the signed change orders, and accounting for the money already paid to Amega under the contract, then were Amega to prevail on all of their claims of monies due it under the contract, the total due Amega would have been under $300,000.00. *See,* Affidavit of Alimadad Jatoi, § 6 sworn to on May 16, 1990, and attached as Exhibit to the Rule 60 (b) motion. The settlement made no sense to Petitioner Alimadad Jatoi as he explained that to the District Court.

On that same third day of trail Petitioner's attorney, Mr. Curtis, informed him through other counsel at his firm that "...the Judge was adamant to see the case settled." *See*, Affidavit of Alimadad Jatoi, § 7. During the interchange between the Court and Petitioner Alimadad Jatoi, Mr. Curtis insisted that Mr. Trickey sit in the place where Mr. Curtis normally would

have sat and that Mr. Trickey represent Petitioner Alimadad Jatoi because Mr. Curtis was refusing to do so. *See*, Affidavit of Alimadad Jatoi, § 7.

It was at this point in the trial, after Petitioner Alimadad Jatoi resumed the witness stand, the the District Court apparently decided that Petitioner Alimadad Jatoi may have made a "...false representation to a federal financial institution..." because he had listed, in an early 1986 financial statement, a valuation on his building provided to him by Guaranty Federal Saving and Loan in a 1985 appraisal. At this point the Court excused the jury and directed counsel to explain to Petitioner Jatoi his 5th Amendment rights.

During this recess, ordered by the Court, Mr. Curtis told Petitioner Jatoi that the Judge was ready to hang him and the jury was about to take him to the cleaners. Petitioner Jatoi responded to Mr. Curtis, "Don't I have a right to appeal." Mr.

Curtis responded that Petitioner had no money to pay for an appeal, that he would be required to post a bond and that he, Mr. Curtis, was not going to work for Petitioners any more. *See*, Affidavit of Alimadad Jatoi, §8 - 9. Shortly thereafter Petitioner Alimadad Jatoi returned to the witness stand where the Court admonished Petitioner of his 5th Amendment rights and repeatedly emphasized the potential criminal liability and his right to remain silent. (TR. Vol. III, 323-4).

Shortly thereafter the Judge sent the parties out again to discuss settlement. At that point Petitioner Jatoi's counsel, Mr. Spencer, informed him that if he didn't settle the "federal judge" had the power to refer him to the District Attorney, a Mr. Marvin Collins, who in turn initiated a criminal investigation and the FBI would get involved. *See,* Affidavit of Alimadad Jatoi, § 22. Mr. Spencer told Petitioner Jatoi that "...you will in all likelihood, with no money end up in jail. As a matter of fact, Jim and I are still concerned that even

if you do this and settle the case, this Judge may still refer you to the D. A. for investigation and criminal prosecution." *See*, Affidavit of Alimadad Jatoi § 11. Petitioner Alimadad Jatoi then requested that Mr. Spencer contact Petitioner Alcina F. Jatoi because he needed her advise. Mr. Spencer refused to even to try and call Petitioner Alcina F. Jatoi and later told Petitioner Alimadad Jatoi that he could not find her at home or in her office. Only at this point did Petitioner Alimadad Jatoi, under threat of criminal prosecution and abandonment by his counsel, agree to the settlement. *See*, Affidavit of Alimadad Jatoi, §§ 12-13.

That settlement was $100,000.00 less than the settlement he had explicitly rejected shortly before the larger settlement left him with nothing. On that same day Petitioners sought other counsel. The following day Petitioners informed the Court and the other parties that the settlement was not voluntary and Petitioners requested that the Court delay disbursement

of the funds. (Appendix N). Petitioners have never negotiated the $150,000.00 check delivered to his former attorney, Mr. Curtis.

## DR. ALCINA F. JATOI

Petitioner Alcina F. Jatoi is a woman and her rights have been violated.

Dr. Alcina F. Jatoi, M. D., Diplomate American Board of Pathologists and member of the American College of Pathologists, seeks relief from this Court as to her rights, which were violated during the trial of a lawsuit filed against her by Amega Construction Company as a co-defendant, and ended in a settlement.

Petitioner Alcina F. Jatoi does state that her constitutional rights were violated. She was deprived of her property and she had a 50% ownership in this property. She states that she is not a surrogate of her husband, Petitioner Alimadad Jatoi. She is the sole owner of the Anatomical Pathology Laboratory of Texas and has an independent practice.

Mr. James Curtis stated in court before the trial began on November 5, 1990, that he was the attorney for Alcina F. Jatoi. However, he had no authority to settle on her behalf. Her name was not even mentioned at the time of settlement, nor was she present in the courtroom, even though a specific request was made by Petitioner, Dr. Alimadad Jatoi.

As a matter of fact, Petitioner Alcina F. Jatoi had mortgaged her laboratory and paid for the property though purchased in 1981, when the medical facility was going to be built. This is documented in the transcript by the testimony of Petitioner Alimadad Jatoi. At Volume II, page 251, line 20, in which Mr. Wetzel, in cross examination of Petitioner Alimadad Jatoi, asks:

Q. And those loans concerned both your land loans--that is to say, the land that is in issue, correct?

A. Yes.

Q. --And it also concerned some loans on medical equipment that your wife had borrowed on?

A. Yes.

Q. And the sum total of those loans exceeded half a million dollars, didn't it?

A. Yes.

In her Rule 60 (b) motion Petitioner Alcina F. Jatoi raised the ownership of the land and her interest in the land. 50% of the funds that were distributed in this case were her property under the community property laws of the State of Texas and her property should be returned to her. Petitioner Alcina F. Jatoi receives separate and independent pay from her laboratory, and income tax as well as social security for herself is paid from her laboratory. This petition on her behalf is being filed in accordance with Amendment I and Amendment V of the Constitution of the United States. Petitioner Alcina F. Jatoi humbly requests an opinion that disposing of 50% of her property in the registry of the Court, without her consent, was legal or illegal under the Constitution of the United States.

## AETNA INSURANCE COMPANY
## THE BOND

In the settlement agreement, Respondent, Aetna Insurance Company received attorney fees in the amount of $100,000.00.

It was one of the conditions of the contract agreement that a performance and labor and materialmans bond be provided. This bond was paid for by Petitioner Alcina F. Jatoi, not Petitioner Alimadad Jatoi.

The performance bond classifies the building as a medical and professional office building and, among other things specifies that no liens and lawsuits will be filed against it. The medical and professional building was never completed, liens were filed and a lawsuit was filed by Respondent Amega Construction Company and some of their subcontractors.

By letter dated April 13, 1984, signed by Respondent Amega Construction Company Business Manager Dwain Howard, Amega acknowledged that the bond was arranged for and by Amega

Construction Company's attorney, Mr. Don Wetzel. The original bond was never provided to Petitioners and was provided to Andy Brundage of A.E.C.C. (Appendix I)_ Consequently, Petitioners were compelled to sell 25% of their assets to the Guaranty Federal Savings and Loan, and raise further monies to enable U. S. Life Title Company to issue a First Priority Lien to Guaranty Federal Savings and Loan.

The priority lien claim by Amega Construction Company and their subcontractors were invalid and in contravention of the contract that existed between Amega Construction Company and Petitioners. In order to circumvent the contract Amega Construction Company filed this lawsuit against the Petitioners in the 236th District Court of Tarrant County, Texas which was moved to the federal system as this case.

After considerable difficulty the Petitioners were provided with a copy of the performance bond, but not until after the loan closed on September 25, 1985.

After repeated requests by letter and telephone calls, Petitioners were finally able to get Respondent Aetna Insurance Company to carry out the inspection and preliminary evaluation of the building. After that task was completed by Aetna Insurance Company, Petitioner Alimadad Jatoi received a request from Aetna Insurance Company that "...no future progress payments or retainage be released to Amega **without our** [Aetna Insurance Company] **prior written approval.**" (Appendix J).

Approximately ten days before trial, Aetna Insurance Company's attorney offered through Petitioners attorneys $60,000.00 cash along with an indemnity agreement that if Petitioners succeeded in their counter claim against Amega Construction Company, Aetna Insurance Company would be responsible for up to $15,000,000.00 in damages and attorney fees. Any testimony of this agreement was restricted by a motion in liminie. (R. Vol.I, pg.31, ln.19-25.)

Petitioners were advised by attorney Mr. Curtis not to accept the settlement because Aetna Insurance Company would be held responsible independently for violating the terms of their bond, and that Petitions were going to win sums in excess of the $60,000.00 offered. Further, according to Mr. Curtis the Supreme Court of Texas had established that an insurance company, that is, a bonding insurance company, must evaluate and determine on their own the liability and has the responsibility to compel the opposing party to perform as per their bond.

On August 10, 1986, Petitioners demanded that Aetna Insurance Company complete the building under the bond. Their refusal to do led to the Petitioners claim being filed against Aetna.

An additional important fact is that the firm of Winstead, Sechrest & Minick, P. C. had represented Petitioners through their attorney, Mr. Stanley Barth, in the financial and loan arrangements that Petitioners had attempted in order to obtain a loan to construct the medical center. Such attempt

was not successful. However, a reading of the transcript determines that the same law firm, now representing Respondent Aetna Insurance Company used the information gathered by the law firm from Petitioner and Mercantile Bank against Petitioner during the trial of Petitioners' case against Amega Construciton Company and Aetna Insurance Company.

Petitioners reason that taking into account the facts stated above, as documented, that it is not reasonable to believe that Petitioners would have willingly, and of their own free will, agreed to settle with Respondent Aetna Insurance Company by agreeing to pay them $100,000.00 in attorney fees of Petitioner's money.

## THE JUDGE

John H. McBryde was appointed as Federal District Judge in Fort Worth, Texas, in August 1990. Prior to this, he was an astute attorney. The Petitioner's

case was perhaps one of the first cases to be tried by him.

During the trial, Mr. McMakin and Mr. McClane, for reasons unknown to Petitioner Alimadad Jatoi came to the court on Wednesday, November 7, 1990, sometime after the lunch break. It was Petitioner's deduction that they were invited to come to the courthouse by Petitioner's attorney, Mr. James Curtis. Petitioner saw Mr. McMakin and Mr. McClane sitting on a bench in the corridor opposite the chambers of Judge McBryde. The reason for their visit was unknown to the Petitioner, and when the Petitioner approached them, they told the petitioner that they were there to assist Mr. Curtis in his discussions with Judge McBryde.

Therefore, the remarks that follow are the Petitioners' opinions deducted post-trial over a period of approximately two years.

The Petitioners believe that the Judge had concluded that if the case was to proceed to a jury verdict, Petitioners might lose the case and appeal. The perusal of the transcript as a whole indicates that under

the circumstances this was a possibility. However, to avoid the retrial, before or after an appeal, Mr. Curtis must have decided, under pressure from the judge, to bring an end to the trial to please the judge and save himself penalties or sanctions.

Another alternative left, under the circumstances, was to ask for a new trial. As a matter or fact, Judge McBryde's warning of criminal prosecution to Petitioner would have invoked from an attorney working on his behalf and for his interests, a request for a mistrial or a new trial. Another alternative open to Mr. Curtis was to withdraw from the case during the morning of Wednesday, November 7, 1990. This would have led to possibly harsh treatment of Mr. Curtis by Judge McBryde. Under the circumstances, Petitioners would not be surprised if a deal was worked out so that the case could be terminated in such a fashion that Mr. Curtis would incur no penalties. Also, the Judge would not have to be reversed in an appellate process. As a result, Petitioner Alimadad Jatoi was therefore not only

coerced and misrepresented to, but manipulated in such a way as to make it look like the settlement had been made in open court with Petitioner's consent.

Attached as Appendix K is an article which appeared in the Wall Street Journal, dated July 23, 1992, which indicates that Judge McBryde does not only encourage settlements, but is prone to coerce them, with or without the consent of all parties involved.

The District Judge's conduct of the trial can be compared with *McKnight v. General Motors Corp.*, 908 F. 2d 104, 115 (7th Cir. 1990) where the Seventh Circuit disapproved of the imposition of arbitrary limitations, and with *Kothe v. Smith*, 771 F. 2d 667, 669 (2nd Cir. 1985) where the Court stated the law with respect to the role of judges in the settlement process. The *Kothe* court stated:

Although the law favors the voluntarily settlement of civil suits it does not sanction efforts by the trial judges to effect

settlements through coercion. In the *Wolf* case, cited with approval in *Del Rio, supra*, the Court said 'We view with disfavor all pressure tactics whether directly or obliquely, to coerce settlement by litigants and their counsel. Failure to concur in what the Justice presiding may consider as adequate settlement, should nor result in an imposition upon a litigant or his counsel, who reject it, of any retributive sanctions not specifically authorized by law.' In short, pressure tactics to coerce settlement simply are not permissible. 'The judge must not compel agreement by arbitrary use of his power and the attorney must not meekly submit to a judge's suggestion, though it be strongly urged.' (citations omitted). *See also, In re Ashcroft*, 888 F. 2d 546 (8th Cir. 1989) [Court expressed concern over attempts by a district court to coerce a settlement.]

The factors an appellate court should evaluate in analyzing voluntariness in a trial settlement are established in *MacLeod v. D. C. Transit System, Inc.*, 283 F. 2d 194 (D.

C. Cir. 1960). Application of those factors to Petitioners circumstances clearly establishes that the District Court should have set the settlement aside and that the appellate court should have reversed the District Court. *Cf. Brees v. Hampton*, 877 F. 2d 111 (D. C. Cir. 1989).

With this background, Petitioners proceed with the factual information regarding this case.

## FURTHER REASONS FOR GRANTING THE WRIT

The events leading to the settlement agreement are important. Petitioner Alimadad Jatoi was the only defendant present in the courtroom. Judge McBryde, in the late afternoon of the third day of trial issued him a warning of the possibility of criminal prosecution, and thereby asked him to consider the 5th Amendment before the jury if the Petitioner wished to proceed with his testimony. This warning was with regard to a "FINANCIAL STATEMENT" or "STATEMENTS" which Petitioner

Alimadad Jatoi had submitted to a federally insured savings and loan, namely, Guaranty Federal Savings and Loan.

This warning of criminal prosecution was followed by events which led to the termination of trial and the settlement.

The 5th Circuit dismissed this warning by ruling that judges have to be alert to defendants' constitutional rights. Petitioner, Alimadad Jatoi, contends that this warning by the District Judge was in fact used by the judge to compel the Petitioner's agreement to settle the case. Additionally, it was used to enable the attorney to frighten him into a settlement. This sequence of events involved misrepresentations and manipulations in the courtroom. Factually, it violated Petitioner Alimadad Jatoi's constitutional rights.

It is important to note the timing of this warning. Moreover, the warning was irrelevant and unrelated to Petitioner's contract with Amega Construction. The accusations and implications concerning financial statements had no basis in fact.

The chronology of events was as follows:

1. On Tuesday, November 6, 1992, while Petitioner Alimadad Jatoi was being cross-examined by Amega Construction Company's attorney, the same subject of financial statements submitted to Guaranty Federal Savings and Loan was brought up for the first time. Mr. Curtis, Petitioner's attorney repeatedly objected. Judge McBryde repeatedly overruled the objections. Judge McBryde then questioned the Petitioner if the financial statements in question were given to Amega Construction. Petitioner answered in the negative. Amega Construction Company's attorney also agreed that the financial statements were not given to Amega Construction Company. Judge McBryde changed his mind and ruled that these financial statements had no relevance to Amega Construction Company's fraud claim and he therefore disallowed them as evidence.

2. On Wednesday afternoon, Petitioner's attorney was in and out of the courtroom. He had summoned his partners to the court house. He had meetings with Judge McBryde. Mr. Curtis began to pressure Petitioner into settlement and quoted many figures. That afternoon, Mr. Curtis told Petitioner, "The Judge wants to talk to you." While in the courtroom, Mr. Curtis told Judge McBryde that Petitioner wanted to talk to him. Mr. Curtis told Judge McBryde that Mr. Richard Trickey had Petitioner Alimadad Jatoi's faith. Mr. Curtis substituted Mr. Richard Trickey in him own place. Petitioner addressed Judge McBryde. Under the circumstances Petitioner tried to make himself as clear as possible to Judge McBryde. This was sudden and unexpected to Petitioner. Petitioner had never addressed a federal judge in open court before. Petitioner told Judge McBryde that the facts in the case were not coming out and that he would not settle the case. Judge McBryde said that a generous offer had been made and that

Petitioner might end up with nothing if the offer was not accepted.

3. Petitioner's attorney Mr. James Curtis tells the judge (Vol. III of Record) that he had conflicting signals from the Petitioner. He also informed Judge McBryde that Petitioner would be testifying against his wishes and informed the judge that he wanted the Petitioner to proceed in a narrative form of testimony. A conference at the bench occurs wherein the judge tells the attorneys outside the hearing of the Petitioner, and the jury, that Petitioner must be cross-examined. Petitioner objected to the discharge of the witnesses. Mr. Curtis again did not tell the truth in the court because witnesses were not discharged with Petitioner's consent or request.

Judge McBryde warns Petitioner about cross-examination, but Petitioner insisted that he would testify. As a matter of fact, Petitioner had already been cross-examined on Tuesday and no such concern was expressed at that time. After Judge McBryde's warning that petitioner would

be subject to cross-examination; Petitioner infers as a predetermined arrangement, either between the Plaintiff's attorneys and Mr. Curtis, with or without the knowledge of the judge, that the financial statement subject is going to be reintroduced and a warning given to the Petitioner.

4. On Wednesday afternoon, Mr. Wetzel, Amega Construction Company's attorney cross-examines Petitioner. He questions on the subject of the financial statements given to Guaranty Federal Savings and Loan. Mr. Wetzel refers to the appraised value of the property. Judge McBryde retires the jury and expresses surprise as to what the Petitioner is testifying to. Mr. Curtis tells Judge McBryde that this is the first time he had heard of it. He also says that Petitioner was part of the problem. There followed a discussion between Petitioner and Mr. Curtis [off the record]. When Petitioner returns to the witness stand, Judge McBryde emphasized the possibility of criminal wrong doing and criminal prosecution. However, Petitioner continued to insist that

he had done nothing wrong and continued to testify. The background of this threat or possible criminal prosecution is important. Only 60 days or so before the trial of this case, the Chairman and Co-Chairman of the Board of Directors of Guaranty Federal Saving and Loan were convicted of fraud against their own company and they were sentenced to a prison terms in excess of twenty years.

5. Judge McBryde retired the jury. He asked Petitioner to step down and go to the counsel table. He began his address and it appears in the transcript as if he is talking to Petitioner. There is no indication in the transcript where Petitioner was and if he is able to hear or respond to the judge.

(i) On Tuesday, Petitioner's attorney was fully aware of the subject of Petitioner's financial statements and that Petitioner had done nothing wrong. Mr. Curtis objected on the same subject and his objections were overruled, over and over again on the same subject. Later Judge McBryde ruled that the financial statements

had nothing to do with Amega Construction Company's case against Petitioner, whether Amega claimed fraud or otherwise.

*(ii) In other words Judge McBryde* was fully aware of the statements which were presented the previous day.

(iii) The fact that the judge and Petitioner's attorney expressed surprise, as if they know nothing about this subject and were concerned about Petitioners constitutional rights, is not only absurd, but borders on being ridiculous. The second point is that Judge McBryde brought up the subject of settlement immediately after his warning. It is also odd that this warning was given after Mr. Curtis had informed Judge McBryde that all the witnesses had been discharged and the defense case was not going to proceed. Actually, Judge McBryde said. "I understand the defense has rested."

Another important point is that Petitioner had returned to the witness stand to receive this warning of criminal prosecution. Judge McBryde spent some

time explaining insistently and inquiring whether Petitioner understood what the judge was saying.

However, to encourage Petitioner to settle, Judge McBryde asked Petitioner to leave the witness stand and go to the counsel table. He particularly proceeded to talk with the attorneys, paralegals, and other, but Petitioner could not hear the discussion or judge's recommendations. The question is, did he verify the Petitioner was able to hear what he was saying? Or, in fact, the Petitioner was unaware of and unable to hear what he was saying? This action is followed by a discussion off the record. Apparently, this discussion is between the Petitioner and his attorney. This exchange in the transcript does not make clear who the Petitioner was speaking with or what Mr. Curtis had advised about settling the case. The question is, was Petitioner talking with his attorney?

The only thing clear in this discussion is that Petitioner gave his attorney authority to settle on the terms that he recommended to both Petitioners "last night," Tuesday,

November 6, 1990. This authority was to accept Amega's offer to settle for all escrow funds and attorney's fees, a total of $2.2 million in favor of Petitioners.

The final agreement that was read into the record was made by Petitioner's attorney and read into the record by the Plaintiff's attorney. The judge was not seated on the bench at this time and the court was not in session. A small group had formed around the court reporter and the Petitioner stood 10-15 feet away from this group on the right side in the company of a paralegal and one of the associates of Mr. Curtis. Mr. Curtis motioned his associate and he asked Petitioner to say, "yes," and Petitioner said, "Yes, sir." The final terms of the agreement Petitioner learned later, not at the time they were dictated in open court.

## FURTHER ARGUMENT

In arriving at their decision the Appellate court has made some incorrect assumptions. The Appellate court also has

paid no attention to the sequence of events and/or whether this warning was relevant to Amega's case against the Petitioners. Petitioner attaches two letters (Appendix L, Append. M) which were written by Charlie Brown, an appraiser, to Guarnaty Federal Saving and Loan in which he appraised the value of the building at $11, 920,000. This figure was arrived at by him with information in past gathered from Amega Construction Company. The Petitioner took no part in the appraisal what so ever. The appraiser was selected and employed by Guaranty Federal Saving and Loan as is normal. Petitioners paid for his services.

The Appellate court incorrectly assumed that Petitioner had heard and responded to the judge while he was advising a settlement on the case. The Appellate court also incorrectly assumed that the Petitioner was part of the group where the settlement was being read and that Petitioner was fully informed. Petitioner was in fact away from the group and was responding only to his attorney while Petitioner was seated 10-15

feet away with a paralegal and associate of his attorney.

## ARGUMENT AS RELATES TO SANCTIONS

It is anticipated that Respondents will argue that this writ if frivolous since the appellate court found the Rule 60 (b) motion appeal to be frivilous. However, logic does not prevail in that argument. This Court must make a determination of its own on the issue of the validity of this writ. It is the opinion of Petitioners, layman that they be, that for the reasons stated this writ is not firvolous, nor is it vexatious or dilatory. There is nothing in the record to demonstrate that this writ is vexatious or dilatory and the appellate court made such a conclusion without citing facts to support its opinion.

In the first opinion the appellate court denied hearing Petitioners point raised for the first time on appeal that his former counsel was also responsible for the

coercion of the settlement. *See*, Appendix A, footnote 3, *infra*.

In fact, in the second opinion the appellate court ignores this issue that was properly raised in the Rule 60 (b) motion both before the district court and the appellate court. The only issue the second opinion really concerns itself with is the sanctions it imposes on Petitioners and their attorney.

The appellate court specifically cautioned Petitioners that if they pursued this case in any court within the jurisdicition of the 5th Circuit Court jurisdiction the such action "...will expose him and any participating counsel to the full panoply of sanctions available to this court, **including but not limited to fines, detention, suspension and disbarment.**"

Petitioners argue that this "caution" has such a "chilling effect" as to violate their constitutional rights to utilize the federal court system to redress their grievances. In effect, the appellate court is imposing

unconstitutional prior restraint that is impermissible under the U. S. Constitution.

The last appeal to the 5th Circuit was in the form of appealing a Rule 60 (b) motion. While rejecting this appeal Judges Jones, Duke and Weiner have made some remarks against me. I was brought up by a man who belonged to the judiciary in British India. He was kind, compassionate, just, and a fair man. I have always held the judiciary in high esteem and respect. Therefore their remarks are not only unfair but very painful to me. These remarks are intemperate and unbecoming of the judiciary as a whole and of appeal judges in particular. I have copied the following paragraph from a surgical book.

**From too much zeal for what is new**
**And contempt for what is old**
**From putting knowledge before wisdom**
**Science before art, cleverness before common sense.**
**From treating patients as cases**
**And from making cure of disease**

**More grievous than it's endurance**
**Good Lord deliver us.**

Someway this can be paraphrased and applied to our justice system.

Maybe I should add: The truth is the center of the judicial universe, around which all our works revolve and toward which all efforts trend.

## CONCLUSION

Petitioners move the Court to grant this *Writ of Certiorari* and to reverse and remand the judgment of the Court of Appeals and to set aside the settlement in this case and to order a trial on the merits.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No. 91 - 1086
Summary Calendar

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IN THE MATTER OF: DR. ALIMADAD JATOI, ET AL.,
Debtors.
AMEGA CONSTRUCTION, INC., ET AL.,
Appellees,

VERSUS
ALIMADAD JATOI,
Appellant.

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Appeal from the United States District Court for the Northern District of Texas
(CA 4-88-041-A)

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(August 23, 1991)

Before GARWOOD, WEINER and BARKSDALE, Circuit Judges.

PER CURIUM: [1]

Alimadad Jatoi appeals from the denial of his motion for a new trial, contending that, as a consequence of certain actions by the trial judge, he was coerced into accepting an involuntary settlement. We AFFIRM.

I.

In August 1985, Amega Construction, Inc., filed suit in state court for breach of a contract to construct an office building in Bedford, Texas, claiming that Jatoi, the project owner, had failed to pay sums due under the contract. Jatoi counterclaimed, alleging that Amega had failed to perform work required under the contract. Jatoi also filed a third party complaint against Aetna Insurance Company, Amega's surety,

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1 Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

maintaining that Aetna was obligated under its performance bond to complete construction of the project. Various unpaid subcontractors to Amega were also involved in the suit, seeking foreclosure of mechanics liens filed against the project.

In August 1987, Jatoi filed a voluntary petition for Chapter 11 bankruptcy. Jatoi removed the state court proceedings to federal district court, which were referred to bankruptcy court pursuant to 28 U.S.C. §157(B) (2) (b). The reference was later withdrawn; and, in November 1990, the action proceeded to trial in the district court.

After three days of trial, the parties announced a settlement which provided for disposition of the proceeds of Jatoi's construction loan, which had been deposited into the court registry. Jatoi acknowledged his agreement to the settlement in open court. On November 8, 1990, the court confirmed the terms of the settlement in a final order which dismissed with prejudice all claims in the litigation.

Jatoi timely filed a motion for a new trial, asserting that, as a consequence of actions by the district judge, he had been intimidated and coerced into agreeing to the settlement. The district court ruled that there was no factual basis for the relief sought by Jatoi, noting that the "settlement was made after extensive negotiations between the parties and their respective attorneys, it was announced in open court, and Jatoi expressed in open court his desire to make the settlement and his understanding of the terms and conditions of the settlement." Jatoi appealed.

II.

Jatoi contends that a new trial is warranted because he was "coerced" into an involuntary settlement. Alternatively, Jatoi contends that, should the record be insufficient to demonstrate involuntariness, this court should grant the district court leave to grant Jatoi relief from its final order under Fed. R. Civ. P. 60(b); and, further, that this appeal should be stayed until the district court rules on the Rule

60(b) motion.[2] Neither contention has merit.

A.

"Appellate review of a district court's action on a motion for new trial is limited to whether the district court abused its broad discretion." *Koonce v. Quaker Safety Prods. & Mfg. Co.*, 798 F. 2d 700, 718 (5th Cir. 1986) (citing *Springborn v. American Commercial Barge Lines, Inc.*, 767 F. 2d 89, 97 (5th Cir. 1985); *Robin v. Wilson Bros. Drilling*, 719 F. 2d 96, 98 (5th Cir. 1983)). "We apply an especially deferential standard in cases [where, as here,] motions for new trial have been denied." *Koonce*, 798 F. 2d at 718 (citing *Dixon v. International Harvester Co.*, 754 F. 2d 573, 586 (5th Cir. 19850).

Jatoi contends that his settlement was involuntary because (1) the district court used pressure tactics to coerce him into settlement, and (2) he was intimidated as a

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[2] In a letter to the court clerk dated May 30, 1991, Jatoi's counsel represented that, on May 22, 1991, a Rule 60(b) motion had been filed in the district court. That motion has not been made part of the record on appeal.

result of the district court 'overly warning' him that he could invoke his right against self-incrimination under the Fifth Amendment to the United States Constitution. [3]

"Settlement agreements 'are highly favored in the law and will be upheld whenever possible because they are a means of amicably resolving doubts and preventing lawsuits.'" *Miller v. Republic Nat'l Life Ins. Co.*, 559 F. 2d 426, 428 (5th Cir. 1977) (citations omitted). "Where the parties, acting in good faith, settle a controversy, the courts will enforce the compromise without regard to what the result might have been had the parties

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[3] In his reply brief, Jatoi contends, for the first time on appeal, that the district court was not solely responsible for the involuntariness of the settlement; that his trial counsel was also at fault "when he coerced a settlement out of Jatoi rather than standing up to the [court] and making a record for appeal." This court has repeatedly held that it is improper to raise an issue for the first time in a reply brief, because the appellee is afforded no opportunity to respond. E.g., *Blumberg v. HCA Management Co.*, 848 F . 2d 642, 646 (5th Cir. 1988), *cert. denied*, 488 U. S. 1007 (1989); *Nissho-Twai Co. v. Occidental Crude Sales, Inc.*, 729 F. 2d 1530, 1539 n. 14 (5th Cir. 1984); *Knighten v. Commissioner of Internal Revenue*, 702 F. 2d 59, 60 n.1 (5th Cir.), *cert. denied*, 464 U. S. 897 (1983). Accordingly, we do not address this issue.

chosen to litigate." *Terrain Enters., Inc. v. Western Cas. & Sur. Co.*, 774 F. 2d 1320, 1321 (5th Cir. 1985), *cert. denied*, 475 U. S. 1121 (1986) (citing *Hennessy v. Bacon*, 137 U. S. 78 (1890)).

1.

Jatoi cites *Kothe v. Smith*, 771 F. 2d 667, 669 (2d Cir. 1985) for the proposition that "pressure tactics [on the part of the trial judge] to coerce settlement simply are not permissible." However, the record clearly reflects that Jatoi was not pressured into settlement by the district court. During trial, the following exchange took place:

**THE COURT:** Dr. Jatoi, you can step down.....While we're here with just the attorneys and legal assistants and court staff; in other words, while the Jury is out, I might mention to you that I think from what I have heard of this case there is the potential that you will be making a mistake in not accepting the settlement offer that has been extended to you. I think your attorneys have done an excellent job in causing as generous an offer as has been made to you to be made to you. I don't

normally become involved in encouraging people to make settlements, and I hesitate to do so in this case, but I see the way this case is going. And we're far enough along now that you can pretty well predict that there is a serious risk you won't get anything. And bearing that in mind, I'm going to encourage you to discuss with your attorneys again the possibility of accomplishing a settlement.... ...I would encourage the attorneys to visit and try to find out what can be done; and then you, Dr. Jatoi, to give serious consideration to whatever it is that is available now by way of settlement.

* * * *

(Discussion off the record.)

DR. JATOI: Well, yes, sir, that is fine.

[JATOI'S ATTORNEY]: Well, speak up. If you want it, say so; the last chance, Mr. Jatoi.

DR. JATOI: We'll accept that.

THE COURT: Do what?

DR. JATOI: Your Honor, we'll accept that.

THE COURT: I can't tell --

[JATOI'S ATTORNEY]: I hear him say he would like to accept the settlement offer, Your Honor, as much as you would like to not get involved, is what I heard him say.

THE COURT: Then you all sit down some place around here and talk.

[JATOI'S ATTORNEY]: I hope so. Would you like to talk?

DR. JATOI: You go ahead and talk.

[JATOI'S ATTORNEY]: Do I have your authority to talk, Dr. Jatoi?

DR. JATOI: I gave you that last night.

[JATOI'S ATTORNEY]: Okay. May I have it again today?

DR. JATOI: Sure.

THE COURT: Okay. Well, you all try to work this thing out.

Jatoi informed the district court that he wanted to accept a settlement offer; most certainly, he gave the court no indication that he felt coerced. Further, Jatoi affirmed on the record that his attorney had authority to discuss settlement. The court did not dictate the terms of settlement to Jatoi; further, it did not participate in any settlement negotiations.

At most, the district court simply encouraged settlement negotiations between the parties and their attorneys to take place. It is not improper for a district court to suggest that parties discuss the possibility of settlement. *See* Fed. R. Civ. P. 16 (a) (5) and (c) (7) (district court may direct parties and attorneys to appear at conference for purpose of facilitating settlement). *See also Ullman v. Olwine, Connelly, Chase,*

*O'Donnell & Weyher*, 123 F. R. D. 253 (S.D. Ohio 1987), *aff'd*, 857 F. 2d 1475 (6th Cir. 1988)j, *cert. denied*, 489 U. S. 1080 (1989) (mere suggestion of settlement discussions is not coercion). The district court's comments concerning settlement were well within its discretion.

2.

Jatoi also contends that the district court, in instructing him on his Fifth Amendment rights regarding an alleged false representation on a financial statement, so intimidated him that he was unable to understand the settlement and was coerced into accepting it. The exchange in question took place just before the foregoing colloquy concerning settlement and was as follows:

THE COURT: Pardon me. I think we better ask the Jury to retire to the Jury room a minute.

(Jury excused.)

THE COURT: Mr. Curtis, I didn't realize -- it just now dawned on me the potential significance of what this witness is saying. As I understand it, there is the potential that he has made false representations to a federal financial institution. .... Maybe you want to, before we get the Jury back, explain to him his Fifth Amendment rights.

* * * *

(Recess was taken.)

* * * *

BY THE COURT:

Q. Dr. Jatoi, I am not going to ask you what you have discussed with your attorneys, but you have been discussing things with your attorneys for the last 10 or 15 minutes; is that correct?

A. That is correct, yes.

Q. And do you understand that you have the right under the Fifth Amendment ... to refuse to give testimony pertaining to any

subject that has the potential to incriminate you in any criminal activity? Do you understand that?

A. Yes, sir.

Q And do you understand that if questions are asked of you concerning things that were transmitted to a financial institution in order to obtain a loan, you would have the right to refuse to answer those questions on the ground that it might tend to incriminate you ...? Do you understand that? .... Do you understand what I am explaining?

A. Yes, sir. ....

Q. Dr. Jatoi, I'm not going to pass ... judgment on whether or not you submitted something that would subject you to a crime --

A. I see.

Q. --of criminal prosecution. All I am telling you, and asking you, is a better way to put it, do you understand --

A. Yes, sir.

Q. -- that if you give testimony that incriminates you in something illegal --

A. I see.

Q. -- that it could be used against you at a later date --

A. I see.

Q. -- if somebody were to prosecute you criminally?

A. Yes, sir.

Q. And you have the right now not to give that testimony, if you want to, by saying you refuse to answer the question on the grounds that it might incriminate you.

A. I will answer.

Q. Okay. Do you understand all of those things?

A. Yes, sir.

Jatoi argues that this exchange represented and "*in terrorem* threat of criminal prosecution" by the district court

against self-incrimination." *United States v. Colyer*, 571 F. 2d 941, 946 (5th Cir. 1978), *cert. denied*, 439 U. S. 933 (1978) (citing *United States v. Lacouture*, 495 F. 2d 1237, 1240 (5th Cir.), *cert. denied*, 419 U. S. 1053 (1974) This is because "the [district] judge is present as the embodiment of the Constitution, charged with the firm duty to see that the rights of all are upheld -- the defendants, the witnesses and the public. Whether and to whatever extent it may be the duty of the trial judge to caution a witness about his Fifth Amendment rights, a careful one never hesitates." *Colyer*, 571 F. 2d at 945 (quoting *United States v. Wilcox*, 450 F. 2d 1131, 1139 (5th Cir. 1971), *cert. denied*, 405 U. S. 917 (1972)). In this instance, the district court exhibited proper concern for the protection of Jatoi's Fifth Amendment rights, and Jatoi's understanding of them. Jatoi's attempts to portray this concern as intimidation

the district court's decision to deny Jatoi's motion for a new trial was not an abuse of its broad discretion.[4]

B.

Alternatively, Jatoi requests a stay of this appeal pending resolution of his Rule 60 (b) motion. Needless to say, "the pendency, or even the completion of an appeal" does not determine whether a Rule 60(b) motion can be considered by a district court. *Ingraham v. United States*, 808 F. 2d 1075, 1080-81 (5th Cir. 1987). "Because the 60 (b) motion may be separately considered pending appeal, a

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[4] Jatoi also contends that the district court exercised "pervasive control" over the trial proceedings in an effort to shorten the trial at his expense. Jatoi contends that the district court's conduct of the trial contributed to a coercive atmosphere which intimidated, and rendered ineffective, his trial counsel and, eventually, led to Jatoi's involuntary settlement. In his reply brief, Jatoi concedes that no objections were made at trial regarding alleged errors in the court's conduct of the proceedings; nor did Jatoi make this argument to the district court in his motion for a new trial. Because Jatoi did not properly raise this issue in the district court, we decline to consider it on appeal. *See Hudspeth v. United States*, 519 F. 2d 1055, 1056 n. 1 (5th Cir. 1975).

Jatoi's reply brief states that his 60 (b) motion "complains about Jatoi's counsel's actions as well as the actions of the [d]istrict [c]court" which contributed to his asserted involuntary settlement. Jatoi's grounds for 60 (b) relief, therefore, are apparently the same grounds presented by this appeal. As previously noted, Jatoi was not pressured into settlement by the district court and his contentions regarding his trial counsel were not properly presented for this appeal. Jatoi offers no new grounds in the Rule 60 (b) motion (e.g., mistake, newly discovered evidence, fraud, etc.) warranting a stay of this appeal pending a ruling on the motion by the district court.[5]

III.

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5 In its response brief, Amega contends that this appeal is frivolous and that it should be awarded attorney's fees as a sanction against Jatoi and his counsel. In his reply brief, Jatoi contends that Amega has intentionally misstated the record on appeal and, therefore, that Amega's response brief should be stricken and "appropriate sanctions" imposed. The parties respective requests are DENIED.

For the foregoing reasons, the district court judgment is AFFIRMED.

August 23, 1991.

APPENDIX B
*IN THE UNITED STATES*
COURT OF APPEALS FOR
THE FIFTH CIRCUIT

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No. 91-7003
Summary Calendar

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IN THE MATTER OF: DR. ALIMADAD JATOI, ET, AL.,

Debtors.

AETNA INSURANCE COMPANY, ET AL.,

Appellees,

versus

DR. ALIMADAD JATOI,

Appellant.

---

Appeal from the United Stated
District Court For the Northern
District of Texas
CA-4-88-41-A

---

Before JONES, DUHE and WIENER, Circuit Judges.

PER CURIUM: *

We consider today Defendant-Appellant Alimadad Jatoi's second appeal in this case, this one being from the district court's denial of Jatoi's Rule 60 (b) motion. Plaintiff-Appellee Amega Construction, Inc. (Amega) and Third Party Defendant-Appellee Aetna Insurance Company (Aetna), in the brief to this court, recite the lengthy litany of ludicrous litigiousness on the part of Jatoi in support of their contentions that the instant appeal should be dismissed as frivolous, and in support of Amega's additional motion for sanctions under FRAP 38. Finding this second appeal to be wholly without merit, vexatious, dilatory and thus totally frivolous, we dismiss the appeal and sanction Jatoi and

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Michael R. Cooper, the latest attorney to represent Jatoi.

I.

Reiteration of the procedural history of this case would serve no useful purpose. It suffices that Jatoi's pettifoggery and abuse of the civil process is facially apparent, or at best thinly disguised, at every turn. We were reluctant to impose sanctions when his prior appeal of the same matter on essentially identical and equally baseless claims was dismissed as frivolous. We shall not, however, repeat our indulgence now. In the face of our dismissal of the first appeal as frivolous, Jatoi has nevertheless repeated the same meritless performance, but even more egregiously and at additional unwarranted cost of time, money and resources to the opposing parties and to the civil justice system as well.

Counsel Cooper attempts to justify his own sanctionable conduct on the basis of his belated entry into the case shortly before Jatoi's appellate brief was due, and on his purportedly limited opportunity to familiarize himself with Jatoi's case. But

that excuse rings hollow in view of the time that has elapsed since counsel spruced up Jatoi's pro se brief and filed it over his own signature. If instead of accepting Jatoi's version at face value without further investigation, counsel had but studied the briefs of opposing counsel and the record excerpts in this case -- an exercise that would not have taken more than a few hours at most -- he would or at least should have recognized the risk of sanction he took in signing and filing the brief for Jatoi in the first place. Moreover, if he had made such a cursory inquiry after filing that brief, he then could have and should have taken corrective action during the period of almost two months that has elapsed since his brief was filed with this court. He has done neither.

Not only do Jatoi's allegations as contained in Cooper's brief present no new authorities, advance no new bases for granting the relief sought, or present citations or arguments other than those meritless ones proposed in his first appeal. Now Jatoi makes unsupported, conclusory

accusations of misfeasance and malfeasance by other parties such as prior counsel and the district court. Such wasteful and abusive conduct, especially at this stage in these proceedings, will not be tolerated.

II.

For the reasons set forth above, the instant appeal is dismissed as frivolous and wholly without merit. For the filing of such a brief and the prosecuting of such an appeal under the instant circumstances, we reprimand Jatoi's current appellate counsel, Michael R. Cooper; and we impose monetary sanctions on Jatoi in the form of attorneys' fees payable to Plaintiff-Appellees Amega Construction, Inc. and Benedict Industries, Inc. We have reviewed the uncontradicted evidence of the services rendered, hourly rate, and explanation submitted by counsel for Amega and Benedict, and accept as reasonable for purposes of sanction the amount of $3,337.50 for participating in this second appeal and $837.50 for preparation of the motion and affidavit for sanctions. We further sanction Jatoi for attorneys' fees

payable to Aetna Insurance Company for this second appeal, in an amount to be determined upon receipt of proper substantiating documentation, if any, from counsel for Aetna, which documentation may be filed with this court at the election of those parties at any time up to fifteen (15) days following the date of this opinion.

Finally, we caution Jatoi that any further efforts to pursue or prolong this matter in this or any other federal forum within the jurisdiction of this court, including, without limitation, motions for panel rehearing and suggestions for rehearing en banc, will expose him and any participating counsel to the full panoply of sanctions available to this court, including but not limited to fines, detention, suspension and disbarment.

III.

This appeal is DISMISSED as frivolous, and Appellant and his counsel are SANCTIONED as set forth above.

June 30, 1992

**APPENDIX C**
**IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

---

**NO. 91-7003**

---

IN THE MATTER OF: DR. ALIMADAD JATOI, ET AL.,

Debtors.

AETNA INSURANCE COMPANY, ET AL.,

Appellees,

versus

DR. ALIMADAD JATOI,

Appellant.

---

Appeal from the United States District Court For the Northern District of Texas

---

(CA-4-88-0041-A)

Before JONES, DUHE and WIENER, Circuit Judges.

PER CURIUM: *

In our June 30, 1992, unpublished per curium opinion for this case we found the acts of Defendant-Appellant Jatoi sanctionable and imposed a monetary sanction in the form of attorneys' fees and costs payable to Plaintiff-Appellees Amega Construction, Inc. and Benedict Industries, Inc., in specified amounts, and to Defendant-Appellee Aetna Insurance Company in an amount thereafter to be determined. Through an administrative oversight, this panel had failed to receive copies of Aetna's motion for sanctions and brief in support thereof, even though same had been filed with this court on April 15, 1992. The panel has now reviewed those filings and all exhibits in light of Jatoi's reply thereto filed April 28, 1992, and supplement our original opinion as set forth below.

After careful consideration of those data and review thereof in light of all applicable criteria for imposing sanctions and

determining the nature and quantum thereof, we are of the opinion that the appropriate amount payable to Aetna as sanctions for Jatoi's frivolous and vexatious appeal is $6,298.50. Jatoi is hereby ORDERED to remit that total sum to Aetna forthwith. All costs of this appeal, including costs associated with the seeking of sanctions against Jatoi by Plaintiffs-Appellees and Defendant-Appellee, are assessed to Jatoi.

July 21, 1992

## APPENDIX D
## IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

---

**NO. 92-1057**

---

IN THE MATTER OF : DR. ALIMADAD JATOI, ET AL.,

DEBTORS.

AMEGA CONSTRUCTION, INC., AETNA INSURANCE COMPANY, BENEDICT INDUSTRIES, INC., AND PIONEER CONCRETE OF TEXAS, INC.,

Appellees,

versus

DR. ALCINA F. JATOI,

Appellant.

---

Appealed from the United States District Court for the Northern District of Texas

---

Before JONES, DUHE, and WIENER, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellant's motion fo file brief out of time is denied.

IT IS FURTHER ORDERED that the motion of appellees, Amega Construction, Inc. and Benedict Industries, Inc., to dismiss the appeal is granted.

April 23, 1992

## APPENDIX E
## IN THE UNITED STATES DISTRICT COURT
## NORTHERN DISTRICT OF TEXAS
## FORT WORTH DIVISION

**CIVIL ACTION NO. CA-4-88-041-A**

**AMEGA CONSTRUCTION, INC.**
**VS.**
**DR. ALIMADAD JATOI, ET AL.**

### ORDER

The above-styled and numbered action came on to be tried on the merits before a jury on November 5, 1990. A jury was selected, opening statements were made and the parties offered evidence until the evening of November 7, 1990, at which time the parties announced to the Court that a settlement has been reached that disposes of all the claims and causes of action asserted by any party to this action against any other party to this action. The settlement agreement of the parties, as presented verbally to the Court,

contemplates that all claims and causes of action of any party to this action against any other party to this action are to be dismissed with prejudice to the refiling of same, that the respective parties are to bear their own court costs, and that the funds on deposit in the Registry of this Court in connection with this action are to be disbursed in an agreed upon manner, as set forth below.

The Court, therefore, ORDERS that, after the deduction by the Clerk of the fee authorized pursuant to 28 U. S. C. § 1914 (b), which is the sum of THIRTEEN THOUSAND EIGHT HUNDRED ONE AND 50/100 DOLLARS ($13, 801.50), all funds on deposit with the Clerk as a result of the amounts paid to the Clerk by Fort Worth Title Company (which payments are the subject matter of the Court's order in this action dated September 2, 1988), which funds include the principal amounts paid to the Clerk by Fort Worth Title Company and all interest earned thereon, are to be distributed by the Clerk as follows:

1. ONE HUNDRED THOUSAND DOLLARS ($100,000.00) of the total funds on deposit with the Clerk, as mentioned above, shall be paid by the Clerk to Aetna Insurance Company. The Clerk's disbursement payable to Aetna Insurance Company shall be mailed to Aetna Insurance Company in an envelope addressed as follows:

Aetna Insurance Company
c/o Mr. Michael L. Parham
Winstead Sechrest & Minick
5400 Renaissance Tower
1201 Elm Street
Dallas, Texas 75270

2. ONE HUNDRED FIFTY THOUSAND DOLLARS ($150,000.00) Of the total amount on deposit with the Clerk, as mentioned above, shall be paid by the Clerk to Dr. Alimadad Jatoi. The clerk's disbursement payable to Dr. Alimadad Jatoi shall be mailed to Dr. Alimadad Jatoi in an envelope addressed as follows:

Dr. Alimadad Jatoi
c/o Mr. James T. Curtis

Decker, Jones, McMackin,
McClane, Hall & Bates
2400 City Center, Tower II
301 Commerce Street
Fort Worth, Texas 76102

3. SIXTEEN THOUSAND DOLLARS ($16,000.00) of the total amount on deposit with the Clerk, as mentioned above, shall be paid by the Clerk to Benedict Industries, Inc.. The clerk's disbursement payable to Benedict Industries, Inc., shall be mailed to Benedict Industries, Inc., in an envelope addressed as follows:

Benedict Industries, Inc.
c/o Mr. Marigny A. Lanier
Riddle & Brown
2100 Olympia & York Tower
1999 Bryan Street
Dallas, Texas 75201

4. FOUR THOUSAND DOLLARS ($4,000.00) of the total amount on deposit with the Clerk, as mentioned above, shall be paid by the Clerk to Pioneer Concrete of Texas, Inc. The Clerk's disbursement payable to Pioneer Concrete of Texas, Inc., shall be mailed to Pioneer Concrete of

Texas, Inc., in an envelope addressed as follows:

Pioneer Concrete of Texas, Inc.
c/o Mr. Mark Sax
Sax & Associates
2925 Briar Park, Suite 1150
Houston, Texas 77042

5. The entire balance remaining of the total funds on deposit with the Clerk, as mentioned above, after disbursement of the amounts mentioned in paragraphs 1, 2, 3 and 4 above, shall be paid by the Clerk to Amega Construction, Inc., shall be mailed to Amega Construction, Inc., in an envelope addressed as follows:

Amega Construction, Inc.
c/o Mr. Don A. Wetzel
Wetzel & Herron
2170 Buckthorne Place, Suite 300
The Woodlands, Texas 77380

Because the settlement reached by the parties renders moot and no longer appropriate rulings made in this action by the Court from the Bench the morning of

November 5, 1990, affecting Fort Worth Title Company and Pioneer Concrete of Texas, Inc., the Court sets aside all such rulings.

The Court further ORDERS that each and every claim and cause of action asserted in this action by any party to this action against any other party to this action should be and they are hereby dismissed with prejudice to the refiling of same. This dismissal includes, but is not limited to, all claims and causes of action asserted in this action (i) by Amega Construction, Inc., against Dr. Alimadad Jatoi, (ii) by Dr. Alimadad Jatoi against Amega Construction, Inc., Aetna Insurance Company or Fort Worth Title Company, (iii) by Aetna Insurance Company against Dr. Alimadad Jatoi, (iv) by Benedict Industries, Inc., against any other party to this action, (v) by Pioneer Concrete of Texas, Inc., against any other party to this action, and (vi) by Fort Worth Title Company against any other party to this action.

The Court further ORDERS that the respective parties to this action are to bear their own court costs.

Any relief sought by any party to this action that otherwise remains undisposed of is hereby denied so that this order shall constitute final and complete disposition of this action and all claims and causes of action asserted in it.

SIGNED this 8th day of November, 1990.

JOHN McBRYDE
United States District
Judge

**APPENDIX F**
**IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS FORT WORTH DIVISION**

**CIVIL ACTION NO. CA-4-88-041-A**

**AMEGA CONSTRUCTION, INC.**
**Plaintiff,**

**vs.**

**DR. ALIMADAD JATOI, et al.,**
**Defendant**

**ORDER**

ON THIS DATE came on for consideration Plaintiff's Motion For Reconsideration of the Rule 60 (b) motion and it appearing that the Motion for reconsideration should be granted and that this Court should exercise its discretion to deny the 60 (b) motion. Accordingly, after reconsidering the 60 (b) motion, it is hereby

ORDERED that the Rule 60 (b) motion, is denied.

SIGNED this 8 day of August , 1991.

John McBryde
JUDGE PRESIDING

**APPENDIX G**
**IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS FORT WORTH DIVISION**

**CIVIL ACTION NO. 4-88-041-A**

**AMEGA CONSTRUCTION, INC.**
**Plaintiff,**

**vs.**

**DR. ALIMADAD JATOI, ET AL.,**
**Defendants.**

**ORDER**

ON THIS DATE came on for consideration Alcina Jatoi's Motion for Relief from the Judgment or Order and it appearing that the Motion should be denied, it is hereby

ORDERED that Alcina Jatoi's Motion and Brief for Relief from the Judgment or Order be, and hereby, is denied.

SIGNED this 18 day of December 1991.

John McBryde
JUDGE PRESIDING

# APPENDIX H
# FINANCIAL SUMMARY
# (BASED ON DRAW # 11)

## A.

DRAW #11 OBTAINED FROM A.E.C.C. REPRESENTATIVE, ANDY BRUNDAGE ON DECEMBER 10, 1990

| | |
|---|---|
| Payments Credited | $ 2,868,345.90 |
| Contract Sum | 3,209.000.00 |
| Additional Change Orders | + 251,655.90 |
| Total Contract Price | $3,460,655.00 |
| | |
| Payments to Amega through Change Order #11 | $2,868,345.90 |
| Payments Made by Peititioners on behalf of Amega for permit fees, inspections and to sub-contractors. | + 321,909.26 |
| Total Paid Amega | $3,190,255.16 |
| | |
| Total Contract Price | $3,460,655.00 |
| Amounts Paid by | |

| | |
|---|---|
| Petitioners | 3,190,255.16 |
| **Net Due Amega on April 15, 1985** | **$ 277,399.84** |

**B.**

**Registry of the Court Ledger**

| | | |
|---|---|---|
| 9-2-88 | Received | $1,193,232.73 |
| 9-9-88 | CD 358626 | |
| ll-15-90 | Bal. includ int. | $1,399,293.00 |

| | | |
|---|---|---|
| 11-13-90 | **Disbursements** | |
| | Forfeiture | 7,809.21 |
| | Registry fee | 13,801.50 |
| | Aetna | 100,000.00 |
| | Dr. A. Jatoi | 150,000.00 |
| | Benedict Ind. | 16,000.00 |
| | Pioneer Conc. | 4,000.00 |
| | Amega | 1,110.545.66 |
| Total | | $ 1,399,293.00 |

# APPENDIX I
# AMEGA CONSTRUCTION

5400 L. B. J. Freeway, Suite 200
Dallas, Texas 75240 (214) 934-2992

April 13, 1984

Alimadad Jatoi, M.D.
800 North Industrial
Euless, Texas 76039

Dear Doctor Jatoi:

This letter will confirm our phone conversation of April 12, 1984. Regarding construction of your building by Amega Construction Company, the following five steps have taken place:

1. On March 12, 1984 - Dr. Alimadad Jatoi and Amega Construction, Inc. signed an Owner-Contractor Construction Contract.

* * * * *

5. Amega Construction, Inc. attorney has provided us with a Construction Bond in

the amount of $3.2 million to cover the contract amount. This has been forwarded to and will immediately be provided to Lender representative Andy Brundage of A.E.C.C.

We look forward to successful and early completion of this project.

Respectfully,

Drain Howard

cc: Guaranty Federal Savings & Loan

# APPENDIX J

**INSURANCE COMPANIES OF NORTH AMERICA, AETNA INSURANCE COMPANY, Companies of CIGNA**
**P. O. Box 720001**
**Atlanta, Georgia 30328**
**(404) 256-5510**

December 31, 1985

Dr. Alimadad Jatoi
P. O. Box 627
Bedford, Texas 76021

Re: Obligee: Dr. Alimadad Jatoi
Principal: Amega Construction, Inc
Project: Jatoi Medical Center
Aetna Bond: XSH 70365
Aetna Claim: 040 B 465397-B

Dear Dr. Jatoi:

As you know, Aetna Insurance Company has retained the services of Carpenter, Carruth & Hover, Inc. to provide assistance with the necessary investigations

surrounding the Default/Termination action taken by you against Amega Construction, Inc. during construction of your new medical office facility located in Bedford, Texas.

As soon as Carpenter, Carruth & Hover is completed with their investigations, they will submit to Aetna a formal report of their findings. Shortly thereafter, we hope to be able to report to you definitively on those courses to be taken by Aetna for the future.

It is our understanding that contract balances, including retainage, are presently being withheld by you or your agent in trust. We therefore request that no future progress payments or retainage be released to Amega without our prior written approval. This request is made in part due to the number of Mechanic's Lien claims that have been filed, as well as our preliminary understanding that some contract work remains uncompleted.

Thank you very much for your consideration, and should you have any questions of Aetna while the investigative

work of Carpenter, Carruth & Hover is ongoing, please notify the writer.

Yours very truly,
John A Mooney
Bond Claims Manager, Dallas

cc: Mr. Richard Trickey
Carpenter, Carruth & Hover, Inc.
Mr. A. J. Campitelli - Aetna Home Ofc.

# APPENDIX K

## REMEDIAL WRITING MAY HAVE BEEN A BETTER CHOICE FOR THIS PROFESSION

By Christi Harlan
Staff Reporter of THE WALL STREET JOURNAL

FORT WORTH, Texas.--Dan Atkerson will spend part of his summer studying reading comprehension at Southern Methodist University in Dallas.

Mr. Atkerson, 32 years old, is no struggling college kid. He's a lawyer, and has been for eight years. But U. S. District Judge John McBryde of Fort Worth isn't convinced that Mr. Atkerson is catching on to some nuances of legal practice, such as following court orders.

Hence, Judge McBryde's decree last week: Mr. Atkerson must take courses in reading comprehension and legal ethics.

For all that, Mr. Atkerson, who declines to comment on the episode, is one lucky

lawyer. Judge McBryde, in his 20 months on the federal bench, has proved even tougher on some other lawyers.

Early last year, for example, the judge learned that sworn statements submitted in a labor dispute by American Airlines officials were signed not by the officials, but by their lawyers. The judge barred two lawyers for the AMR Corp. unit from appearing in any case in federal court in North Texas for six months and fined them $18,000.

So, Mr. Atkerson should have had fair warning when he appeared in Judge McBryde's court as local counsel for a unit of Merck & Co. in a case filed by a former employee of the big drug company. Judge McBryde directed that Mr. Atkerson and a Merck representative "with unlimited settlement authority" attend a conference aimed at settling the case.

But the in-house Merck lawyer who attended the conference didn't have any authority to offer money to the plaintiff, so Judge McBryde angrily ordered a second conference. Another in-house Merck

lawyer, associate general counsel Rosemary Orr, appeared. But she wasn't authorized to settle the case for more that $12,000.

Judge McBryde, now furious, ordered both Mr. Atkerson and Ms. Orr to study reading comprehension and legal ethics; when both asked him to reconsider, the fiat hit the fan. The judge said he would indeed reconsider - all of his options, including fines, disbarment from North Texas courts and criminal contempt of court charges.

At a hearing last week, lawyers for Ms. Orr and Mr. Atkerson withdrew their requests for the judge to reconsider his order. Judge McBryde let Merck and Ms. Orr off the hook, but directed Mr. Atkerson to summer school, as ordered. In writing, of course.

## APPENDIX L

**CHARLIE B. BROWN &**
**ASSOCIATES, LTD.**
**609 West Main Street**
**Carbondale, IL 62901**
**(618) 529-5005**
**FAX (618) 529-2249**

**Charlie B. Brown, MAI, SRPA**
**Trace B. Brown, CREA**

December 28, 1990

Re. Rosemont Professional Building

Dr. Alimadad Jatoi
2520 Harwood, Suite 400
Bedford, Texas 76021

Dear Dr. Jatoi:

My records indicate I was employed to appraise the Rosemont Professional Building in the early part of 1985 for the purpose of valuing it for mortgage loan purposes as it was expected to be upon the

completion of the construction program described within the completed report. My employment was based on the acceptance of my qualifications by the Guaranty Federal Savings and Loan of Dallas, Texas with a copy of the report to be sent to them. This was done as evidenced by the submission letter to Ms. Kennis Ketchen, dated March 12, 1985, a copy of which is attached.

Very truly yours,
Charlie B. Brown K& Associate, Ltd.
by: Charlie B. Brown, MAI, SRPA

## APPENDIX M

**CHARLIE B. BROWN**
**609 West Main Street**
**Carbondale, IL 62901**

**Member:**
**American Institute of**
**Real Estate Appraisers**

**Phone**
**Area Code 618**
**549-6921**

March 12, 1985

Ms. Kennis Ketchen
Guaranty Federal Savings & Loan
14180 Dallas Parkway, Suite 400
Dallas, Texas 75240

Dear Ms. Ketchen:

As requested, I have made an evaluation-analysis on the Rosemont Building and the Rosemont Clinic, currently under construction at the southwest corner of Brown Trail and Taylor Drive in Bedford, Texas for the purpose of estimating it's fair market value for mortgage loan purposes, as it expected to be upon completion of the construction program.

The accompanying report which has been completed in accordance to accepted appraisal standards and in accordance with F.H.L.B.B. Memorandum, R-41b describes the method of approach and contains data gathered in my investigation.

It is my opinion, that based upon said projection statements, the fair market value of the property, as it will be upon its completion, subject to the limiting conditions contained herein, is

ELEVEN MILLION NINE HUNDRED
TWENTY THOUSAND DOLLARS
($11, 920, 000)

Thank you for allowing me to be of service.

Respectfully submitted

Charlie B. Brown, MAI

## APPENDIX N

**Alimadad Jatoi, M.D., FRCS (ENG)**
**SURGEON**
**2520 Harwood, #400**
**Bedford, TX 76021**
**(817) 267-1361**

November 9, 1990

Hand Delivered 11/9/90
Certified Letter #P 990 159 489
with Return Receipt Requested
same day delivery

The Honorable Judge McBryde
United States District Court
Northern Division of Texas
United States Court House, 4th Floor
819 Taylor Street (10th & Lamar)
Fort Worth, Texas 76102-6114

Re.: Amega Construction Company
vs.Alimadad Jatoi, M. D.
Case # CA-4-88-041-A
Counter Claimant: Alimadad Jatoi, M.D.

Dear Judge McBryde:

I wish to respectfully express my objection to the settlement, which was entered of record Wednesday, November 7, 1990. After you terrified me from the bench with threats of criminal prosecution and after my lawyers further terrified me with threats of criminal prosecution for alleged bank fraud, which I have not committed and of which I am totally innocent of, I was coerced under duress to say "yes" in open court with respect to this settlement.

I am now seeking new counsel, and as soon as a transcript can be secured (one has already been ordered I understand), I will file a motion to set aside or alter this judgment. Please consider this letter notice of my request to reject the settlement, and of my request for time to file a motion to set aside or the judgment. What went on in your court room with respect with me left me unable to exercise my own free will in agreeing to that settlement.

I would respectfully request that you not allow any disbursement of the funds in the

Registry of the Court until after we have secured a transcript, and I can make a motion to set aside the judgment, which I have never, of my own free will, agreed to.

Respectfully yours,

Alimadad Jatoi, M.D., F.R.C.S. (Eng.)

## AFFIDAVIT OF PETITIONERS AS TO MAILING PETITION OF WRIT OF CERTIORARI

We, Alimadad Jatoi and Alcina F. Jatoi, Petitioners, swear that the foregoing Petition was deposited in the United States mail with the proper postage, prepaid, on November ___, 1992.

_____

Alimadad Jatoi

STATE OF TEXAS §
COUNTY OF DALLAS §

SWORN TO AND SUBSCRIBED before me, a notary public, by the said Alimadad Jatoi and Alcina F. Jatoi, on this the ___day of November 1992, to certify which witness my hand and seal.

_____

Notary Public in and for
The State of Texas

My Commission Expires:

_____

**CERTIFICATE OF SERVICE**

I hereby certify that a correct copy of this Petition was mailed, postage prepaid, to Amega Construction, Inc., c/o Dan Vincinza, Esq., 2170 Buckthorne Place, The Woodlands, TX 77380; Aetna Insurance Company, c/o Pat Walinski, Esq.j, 5400 Renaissance Tower, 1201 Elm Street, Dallas, TX 75270; Benedict Industries, Inc., c/o Donna Benedict, 341 Bennett Lane, Lewisville, TX 75057; and

Pioneer Concrete of Texas, Inc., c/o Mark Sax, Esq., 2925 Briar Park, Suite 1150, Houston, TX 77042, attorneys for Respondents on this the ___day of November, 1992.

_____

Alimadad Jatoi

Supreme Court, U.S.
FILED
DEC 22 1992
OFFICE OF THE CLERK

(2)

No. 92-898

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

ALIMADAD JATOI
ALCINA F. JATOI,
*Petitioners,*
v.
AMEGA CONSTRUCTION, INC., et al,
*Respondents.*

**Petition For a Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION

DON A. WETZEL
Counsel of Record
Wetzel & Herron, L.L.P.
2170 Buckthorne Place, Suite 300
The Woodlands, Texas 77380
(713) 363-5050

Attorneys for Respondents
Amega Construction, Inc. and
Benedict Industries, Inc.

Alpha Law Brief Co. • 6113 Aletha Lane • Houston, Texas 77081 (713)981-9000

39 pp

## QUESTIONS PRESENTED

The Petitioners have failed to comply with one or more of the United States Supreme Court's rules regarding presentation of a Petition for Writ of Certiorari. This is the second such defective petition by one of the Petitioners, Dr. Alimadad Jatoi. Accordingly, the following question is presented for review:

1. Should this Court dismiss Petitioners' Petition as untimely under Rule 13 of the Rules of the Supreme Court of the United States, and as not complying with proper form, under Rules 14 and 33 of the Rules of the Supreme Court of the United States, and further, should this Court award damages or single or double costs to Respondent for a frivolous Petitioners' Petition, under Rule 42.2 of the Rules of the Supreme Court of the United States?

The questions presented by Petitioners rest on a flawed premise -- that the only potentially timely appeal, from Cause No. 91-7003, was decided by the Fifth Circuit Court of Appeals yon any basis other than the fact that Petitioner Alimadad Jatoi had simply presented on a second appeal matters already decided and foreclosed in a final first appeal. Petitioner Alimadad Jatoi merely asserts his constitutional rights were violated in order to present five questions for review.

Those five questions are not properly before this Court. Respondents categorize Petitioners' complaints as follows:

> 2. Do the doctrines of waiver and law of the case prevent re-litigation, on a second appeal, of matters decided on a first appeal which has become final?
>
> 3. Does a federal court possess inherent power to require litigants before it to follow rules of procedure, and to sanction litigants or dismiss their causes of action should they fail to follow these rules, following notice and an opportunity to respond?

## LIST OF PARTIES

Amega Construction, Inc. is a Texas corporation, and a subsidiary of G.A., S.A., a French corporation. Benedict Industries, Inc. is a Texas corporation.

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- II. THIS IS AN ORDINARY DISPUTE, CONCERNING WELL-SETTLED DOCTRINES OF LAW OF THE CASE AND WAIVER, AND RAISES NO SPECIAL OR IMPORTANT ISSUES. . . . . 8

A. The issues presented by Jatoi in this second appeal have already been decided against him in an appeal that has become final. . . . . 9

B. Dr. Jatoi has waived his point on the actions of his trial counsel by his failure to adequately brief them. . . . . 14

C. The trial court did not abuse its discretion in denying Jatoi's Rule 60(b)Motion. . . . . 16

D. Rule 60(b) is not an excuse to re-litigate, and attorney conduct is not an excuse under Rule 60(b). . . . . 17

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No. 92-898

IN THE

# Supreme Court of the United States

October Term, 1992

ALIMADAD JATOI
ALCINA F. JATOI,
Petitioners,

v.

AMEGA CONSTRUCTION, INC., et al,
Respondents.

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Petition for a Writ of Certiorari
To The United States Court of Appeals for the Fifth Circuit

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## RESPONDENTS' BRIEF IN OPPOSITION

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Respondents, Amega Construction, Inc. ("Amega") and Benedict Industries, Inc. ("Benedict"), respectfully request that this Court deny the Petition for Writ of *Certiorari*, seeking review of three judgments of the United States Court of Appeals for the Fifth Circuit. All opinions are unreported, and are reproduced in Petitioners' Appendix as Exhibits A-D.

## STATEMENT OF THE CASE

Petitioners Alimadad Jatoi and Alcina F. Jatoi fail to raise any special or important reasons to warrant granting their Petition for a Writ of *Certiorari*. The arguments made by the Jatois involve issues that are well-settled and do not involve conflicting decisions between the United States courts of appeals or other state courts of last resort. The Jatois' claims do not implicate any federal constitutional provision. This statement will describe the pertinent facts omitted from the Jatois' statement of the case.

### A. Factual Background

This lawsuit is essentially a dispute over a building contract. This litigation concerns the construction of a five-story office tower and attached building in Bedford, Texas. Both structures were completed in 1985, and the tower was fully leased to a tenant in 1986. Record 001831; Transcript II-186-87; III-193-95.[1] The buildings, however, were never paid for by Dr. Alimadad Jatoi, the owner, despite full completion by Amega, the general contractor.

In the summer of 1985, when construction payments were wrongfully withheld by Dr. Jatoi, numerous construction liens were filed against the project. Record 000128-30, 000492, 000496, 000500; Transcript I-21-22. Instead of paying these obligations, Dr. Jatoi withdrew $1.25 million in construction funds committed to by the construction lender, which were to have been used to

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1. The record on appeal is designated "Record". For example, an order from the trial court contained at page 00155 will be cited Record 00155. The trial testimony is designated "Transcript", along with a roman numeral, either I, II, or III, to designate the three volume transcript. For example, transcript volume II, page 12, is cited Transcript II-12.

pay for the work, and deposited the funds in an escrow account **expressly designated for payment to Amega** once Amega was able to prove its claim in litigation. Record 000449; Transcript I-26.

On November 5, 1990, this case was called to trial. Both Dr. Alimadad Jatoi and Alcina Jatoi appeared personally, and through a designated attorney of record. During Amega's presentation of evidence, among other things, expert witnesses were examined and Dr. Jatoi was cross-examined concerning alleged false and fraudulent statements Dr. Jatoi made to the savings and loan which originated his construction loan. Transcript III-248-251, 309-310. Two and one-half days into trial, facing considerable evidence in support of Amega and against the allegations of Dr. Jatoi, Dr. Jatoi agreed to settle the case, following advice from the fifth of what was to become seven separate attorneys of record hired by Dr. Jatoi in this litigation.

After settlement, and signing of a judgment and disbursal of funds, Dr. Jatoi filed a *pro se* motion for new trial, which was denied and appealed. During the pendency of that appeal, Dr. Jatoi filed a Federal Rule of Civil Procedure 60(b) motion, again seeking to overturn the voluntary settlement. That motion was denied and appealed. About one year after the trial, following the Fifth Circuit's denial of Dr. Alimadad Jatoi's first appeal, concerning his motion for new trial, Dr. Alimadad Jatoi's wife, Dr. Alcina Jatoi, filed her own Rule 60(b) motion (she had never filed a motion for new trial). That motion was denied, and appealed.

Two of these three appeals -- the first one by Dr. Alimadad Jatoi, and the appeal by Alcina Jatoi -- are not properly before this Court because the Petition for Writ of Certiorari is not timely.

## B. Procedural History: Cause No. 91-7003 (Alimadad Jatoi's second appeal)

This is the second appeal of Dr. Alimadad Jatoi, seeking to overturn a voluntary settlement made by him two and one-half days into the trial of this litigation. The first appeal, under Cause No. 91-1086, concerned the trial court's denial of Jatoi's motion for new trial. The trial court's denial was affirmed by the Fifth Circuit in a *per curiam* opinion rendered August 23, 1991.

During the pendency of this first appeal, under Cause No. 91-1086, Dr. Jatoi's sixth attorney, Michael Mosher, filed a motion with the trial court, pursuant to Federal Rule of Civil Procedure 60(b), seeking relief from the judgment on appeal to the Fifth Circuit. The Rule 60(b) Motion was a virtual restatement of the appellate brief in Cause No. 91-1086. That motion was denied by the trial court, and Dr. Jatoi commenced his second appeal *pro se*. This *pro se* appeal was begun after the Fifth Circuit rendered its decision in Dr. Jatoi's first appeal under Cause No. 91-1086. Following several extensions of time, Dr. Jatoi filed a *pro se* brief in his second appeal, which brief was rejected by the Fifth Circuit as inappropriate and inadequate under the Federal Rules of Appellate Procedure. Dr. Jatoi then retained his seventh attorney, Michael Cooper, who essentially repaginated the Rule 60(b) motion filed by Mr. Mosher, which was itself a copy of the first appellate brief, and filed it as a brief in the second appeal, under Cause No. 91-7003. The second appeal is currently before this Court.

This litigation began in 1985 when Amega filed its lawsuit to be paid in the 236th Judicial District Court of Tarrant County, Texas. Due to the nature of the litigation and the large number of innocent people left unpaid for completed and accepted work, there were several accelerated trial settings requested. Record 000073; 000127. Amega

sought and obtained one normal and three preferential trial settings. Record 000127. Dr. Jatoi filed motions for continuance to each trial setting. Record 000127-133; 000381. Continuances were granted on the second setting when, on the eve of trial, Dr. Jatoi's then counsel of record moved to withdraw from continued representation. Record 000381. Later, when the dispute at issue in this appeal was finally to be tried in state district court, in a third attempt to block the trial, Dr. Jatoi filed a meritless motion to disqualify Amega's attorneys. Record 000132. When the motion was denied, Jatoi filed a Writ of Mandamus to strike Amega's counsel and prohibit the third jury trial setting. The Fort Worth Court of Appeals reviewed the writ and denied all relief without necessity of response or hearing. Record 000381. Nonetheless, this trial did not occur for other reasons related to Dr. Jatoi.

Because a large number of materialmen and subcontractors had been unpaid by Dr. Jatoi's refusal to pay monies for work performed and accepted, an accelerated trial setting for seven subcontractor intervenors, but not Amega, was ordered. Record 000131, 000381. Seven trials were held, and seven judgments were entered, stating all work was properly performed. Transcript I-21-22. Each judgment was then paid by Jatoi with the original construction funds held in escrow. *Id.*

Less than one week before the fourth scheduled trial setting, in which Amega's claims were to be tried, Dr. Jatoi filed a voluntary petition under Chapter 11 of the Bankruptcy Code. Record 000152-55; 000381. Following Dr. Jatoi's filing under Chapter 11, Amega filed an emergency application to lift the stay to protect the trial setting and the Texas state court's jurisdiction. Jatoi, of course, opposed the motion. Record 000072; 000152-55. Two hearings were held. Following the second hearing, Judge Abrams of the Federal Bankruptcy Court, Fort Worth Division, entered findings of fact and conclusions of law specifically

disapproving of the "delay" used by Dr. Jatoi to avoid his legitimate obligations, Record 000153, and ordered Dr. Jatoi's attorney not to further interfere with the state court jurisdiction.

Dr. Jatoi did thereupon file an application to remove the remanded state litigation to Federal Bankruptcy Court on the day of the state court's preferential trial setting. Record 000001. Amega immediately filed a motion to remand, asserting that the common law/Texas statutory issues involved in the litigation were not federal in origin nor part of a core, bankruptcy controlled proceeding. Record 000171, 000175, 000176. In an attempt to invent federal jurisdiction, Jatoi amended his counterclaim and asserted a violation of "RICO", 18 U.S.C. 1961, *et seq.* Record 000193. By asserting a "RICO claim", remand was made impossible under the law then in existence, and Jatoi had successfully avoided another trial setting. Record 000193, 000196.

Both Amega and Aetna Insurance Company properly and promptly filed motions to withdraw the reference from the bankruptcy court and sought trial in the United States District Court, Fort Worth Division. Record 000292, 000380, 000660. These motions were granted. The Federal District Court took the escrowed construction funds into its registry pending a trial on all matters. Record 001326, 001597.

While within the Federal District Court system, this case was set for trial six different times, during which Dr. Jatoi's lawyers continued to withdraw one after the other, as they had three times in state court. Record 000127, 131 (state court); 001215, 001429, 001440, 001538, 001735, 001738 (settings); 001673, 001739, 001896 (withdrawals). There was further delay when Jatoi filed motions to extend discovery and otherwise delay resolution of this case. Record 001674, 001701. Finally, this case was called to trial on November 5, 1990. During the third day of trial,

and facing evidence in support of Amega and against the allegations of Jatoi, Dr. Jatoi vacillated on prior offers to settle the case. Such offers were made solely to avoid further court proceedings, delay, and expense. Dr. Jatoi settled this case. Transcript III-326,324.

After settlement, and signing of a judgment and disbursal of funds, Dr. Jatoi filed a *pro se* motion for new trial. The appeals referenced in the first two paragraphs of this Procedural History then occurred. This Court is now faced with the second appeal by Dr. Alimadad Jatoi.

### C. Procedural History: Cause No. 91-1086 (Alimadad Jatoi's first appeal) and Cause No. 92-1057 (Alcina Jatoi's appeal)

Dr. Alimadad Jatoi's first appeal, of the trial court's denial of his motion for new trial, was presented to the Fifth Circuit under Cause No. 91-1086. On August 23, 1991, the Fifth Circuit issued a *per curiam* opinion disposing of Jatoi's claims. On November 12, 1991, Dr. Alimadad Jatoi filed with the United States Supreme Court what he called a "Request for Extension of Time to File Pro-Se Petition".

Amega interpreted this "Request" to be a Motion for Extension of Time to File a Petition for Writ of Certiorari. On November 25, 1991, Amega filed a response to the "Request", asking that the request be denied. No further action was taken by Dr. Jatoi until he filed a *pro se* Petition for Writ of *Certiorari* on September 30, 1992. This Petition was returned by the Clerk of this Court for failure to comply with Supreme Court Rule 14, among others. A second Petition was filed on or about November 18, 1992, and received by Amega's and Benedect's attorneys on November 23, 1992.

Dr. Alcina Jatoi's appeal of the denial of her Rule 60(b) motion was decided by the Fifth Circuit under Cause No. 92-1057 on April 23, 1992. Alcina Jatoi's request to

this Court for a Writ of *Certiorari* was not made until September 30, 1992. It, too, was rejected and later refiled with Alimadad Jatoi's second petition.

## REASONS THE PETITION SHOULD BE DENIED

### I. THIS COURT HAS NO JURISDICTION OVER TWO OF THE THREE APPEALS PRESENTED IN THIS PETITION FOR WRIT OF *CERTIORARI*.

Two of the three appeals presented for consideration in this Petition for Writ of *Certiorari* -- Dr. Alimadad Jatoi's first appeal, under Cause No. 91-1086, and Dr. Alcina Jatoi's appeal, under Cause No. 92-1057 -- were decided by the Fifth Circuit more than 90 days before this Petition for Writ of Certiorari was first filed. The 90-day period set forth in U.S. Supreme Court Rule 13 bars consideration of these two appeals.

The United States Supreme Court has held that this 90-day period "is mandatory and jurisdictional" and "we have no authority to extend" the time for filing. *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990). *See also Billmeyer v. Tovar*, 469 U.S. 872 (1984) (petition for writ of certiorari denied as "untimely").

As to these two appeals -- Dr. Jatoi's first appeal, and Dr. Alcina Jatoi's appeal -- this Court should deny the Petition for Writ of Certiorari for lack of jurisdiction.

### II. THIS IS AN ORDINARY DISPUTE, CONCERNING WELL-SETTLED DOCTRINES OF LAW OF THE CASE AND WAIVER, AND RAISES NO SPECIAL OR IMPORTANT ISSUES.

Rule 10 of this Court permits the discretionary writ of *certiorari* to be granted "*only* when there are special and important reasons therefor." (emphasis added). Alimadad Jatoi has presented nothing new on his appeal of Cause No. 91-7003 (sometimes hereinafter "Jatoi II"). His prior appeal under Cause No. 91-1086 (sometimes hereinafter "Jatoi I") controls all issues presented in this appeal. In his briefing in Jatoi II, Dr. Jatoi did nothing more than repaginate and retype arguments which failed in Jatoi I. Under the well-settled doctrines of law of the case and waiver, Jatoi's complaints are lost. A re-urging of matters, already decided in one appeal, in a second appeal, and not in a motion for rehearing, is not adequate briefing. Dr. Jatoi's second appeal was appropriately decided against him.

**A. The issues presented by Jatoi in this second appeal have already been decided against him in an appeal that has become final.**

As noted, this is the second appeal by Dr. Jatoi related to his settlement of the underlying litigation. The issues Dr. Jatoi presents to this Court have already been addressed by the Fifth Circuit in Cause No. 91-1086, in an opinion issued August 23, 1991. *See Amega Construction, Inc. v. Jatoi*, No. 91-1086 (5th Cir. August 23, 1991) (reproduced in Petitioners' Appendix at "A", pages 59ff.) Because a panel of the Fifth Circuit had already heard an appeal of this case, involving the same issues that are raised on this second appeal, and because Dr. Jatoi did not appeal that first decision timely, and did not raise any new issues (in fact copying virtually word-for-word his first appellate brief in the second proceeding before the Fifth Circuit), the Fifth Circuit was bound by the doctrine of "the law of the case" and correctly affirmed the trial court's order. *See Adams-Lundy v. Association of Professional Flight Attendants*, 792 F.2d 1368, 1371 (5th Cir. 1986). The holdings of a circuit court must be followed in all subsequent proceedings in the

same case, both in the trial court and on a later appeal in the appellate court. *Id.* The Fifth Circuit's review was limited by settled law -- it could not reconsider the issues presented in the prior appeal. The proper time for Jatoi to have asked for reconsideration of Jatoi I was in a Petition for Rehearing (which was never filed). *Morrison v. Duckworth*, 898 F.2d 1298, 1300, n.2 (7th Cir. 1990).

Even though Jatoi I's opinion is unpublished, unpublished opinions by one panel are binding on all panels of the Fifth Circuit. *United States v. Don B. Hart Equity Pure Trust*, 818 F.2d 1246, 1250 (5th Cir. 1987). *See also* 5th Cir. R. 47.5.3. There have been no United States Supreme Court decisions overruling the principles contained in Jatoi I, nor have there been any changes in statutory law. Therefore, even if other panels of the Fifth Circuit were to have disagreed with the conclusions reached in Jatoi I, they could not change that result. *United States v. Don B. Hart*, 818 F.2d at 1250. *See also Girard v. Drexel Burnam Lambert, Inc.*, 805 F.2d 607, 610 (5th Cir. 1986).

Jatoi I became final when Dr. Jatoi failed to appeal further, either through a rehearing *en banc* to the entire Fifth Circuit, or a timely petition for writ of certiorari, complying with U.S. Supreme Court Rules, to this Court. The decision in the first appeal -- Jatoi I, or Cause No. 91-1086 -- is therefore binding as to two issues: one, Jatoi voluntarily settled this litigation, and the court acted within its discretion both in its involvement in the settlement and in denying Jatoi's motion for new trial; and two, that Jatoi has waived complaints about the actions of his trial counsel. These will be addressed in that order.

**Jatoi's voluntary settlement:** Jatoi's first appeal was on the following issue concerning the settlement:

> Whether the district court inpermissibly coerced, or inpermissibly contributed to the coercion of the settlement

> memorialized in the final order of the district court.

*See* Jatoi's first appellate brief, under Cause No. 91-1086, at 6. Jatoi's second appeal presented essentially the same issue:

> It is the contention of the appellant herein, Dr. Jatoi, that a review of the record as a whole, rather than isolated statements by the Trial Judge, clearly establishes that the settlement that Dr. Jatoi entered into of the district court litigation he was involved in . . . was coerced and should be set aside.

*See* Jatoi's second appellate brief, under Cause No. 91-7003, at 12-13. The same complaint again is made here. *See generally* Petitioners' Petition for Writ at 41.

All issues are identical. The panel of the Fifth Circuit hearing this appeal for the first time had the following to say about this contention:

> Jatoi informed the district court that he wanted to accept a settlement offer; most certainly, he gave the court no indication that he felt coerced. Further, Jatoi affirmed *on the record* that his attorney had authority to discuss settlement. The court did not dictate the terms of the settlement to Jatoi; further, it did not participate in any settlement negotiations.

> At most, the district court simply encouraged settlement negotiation between the parties and their attorneys to take place. It is not improper for a district court to suggest that parties discuss the possibility of settlement. . . . The district court's comments concerning settlement were well within its discretion.

*Amega Construction, Inc. v. Jatoi*, No. 91-1086, slip op. at 7 (5th Cir. August 23, 1991) (contained in Petitioners' Appendix at "A", pages 68-69). Jatoi has already appealed and lost this issue. He cannot re-litigate issues already decided adversely to him on one appeal, that has become final in a second appeal. Dr. Jatoi's appeal concerning the settlement should be denied.

**Jatoi's abandonment by counsel:** Dr. Jatoi stated his second contention as follows in the Fifth Circuit proceedings for Jatoi II:

> It is further the contention of the appellant Dr. Jatoi that the record clearly establishes that his counsel abandoned him during the trial of this case and all of those factors, **the coercion exercised by the Trial Judge to affect a settlement**, and abandonment by counsel during a critical process of the trial, required Dr. Jatoi's Rule 60(b) Motion filed with the Trial Court be granted.

*See* Jatoi brief, in Cause No. 91-7003, at 13 (emphasis added). He has basically repeated this contention here. *See generally*, Petitioners' Petition for Writ at 20. To the extent this second point concerns the action of the trial judge, it is foreclosed by the Fifth Circuit's decision in Jatoi I, Cause No. 91-1086, which is a final judgment not properly before this Court. The contention is also foreclosed because Dr. Jatoi did not present it in Jatoi I, and Jatoi II was merely a restatement, virtually word-for-word, of Jatoi I. The Fifth Circuit addressed this point about Jatoi's trial counsel in Jatoi I, *Amega v. Jatoi*, No. 91-1086 (5th Cir. August 23, 1991), as follows:

> **In his reply brief, Jatoi contends, for the first time on appeal**, that the district court was not solely responsible for the involuntariness of the settlement; that his trial counsel was also at fault "when he coerced a settlement out of Jatoi rather than standing up to the [court] and making a record for appeal." This court has repeatedly held that it is improper to raise an issue for the first time in a reply brief, because the appellee is afforded no opportunity to response. . . .

*Amega v. Jatoi, supra* at 4, n.3(emphasis added) (found in Appendix A at p. 64). Jatoi made the same mistake in Jatoi II. He copied his original appellate brief in Jatoi I virtually word-for-word, and failed to brief the issue concerning the

actions of his trial counsel. **The Fifth Circuit had already held that Jatoi's first brief did not raise the issue of the responsibility of Jatoi's trial counsel for the alleged involuntary settlement. Because Jatoi did not choose to rewrite or add anything of substance to his brief from the first appeal, he waived this contention yet again.**

The Fifth Circuit was bound by the doctrine of "the law of the case," in ruling on Dr. Jatoi's second point. This doctrine is well settled and is neither mentioned nor challenged by Dr. Jatoi. Dr. Jatoi's Petition should be denied.

### B. Dr. Jatoi has waived his point on the actions of his trial counsel by his failure to adequately brief them.

Amega and Benedict believe that Dr. Jatoi's entire appeal is foreclosed by the Fifth Circuit's prior decision in Jatoi I, *Amega v. Jatoi*, No. 91-1086 (5th Cir. August 23, 1991). However, if this Court feels that Dr. Jatoi's second appellate point regarding the conduct of his attorney has not already been decided, Jatoi has waived the point by his inadequate briefing.

As noted, Jatoi simply copied word-for-word his first appellate brief, in presenting his second appeal. No new authorities were cited by Dr. Jatoi in Jatoi II, his second appeal to the Fifth Circuit. The authorities cited by him, at pages 13-23 of his second Fifth Circuit brief, all deal with and are directed toward the actions of the trial court. Such violated Fifth Circuit briefing rules. *See* Fed. R. App. Pro. 28(a)(5) and Fifth Circuit R.28.3. Similarly here, in his Petition for Writ, no case is cited which addresses the issue of the actions of an attorney which could support the granting of a Rule 60(b) Motion. Such violates Supreme Court Rules 14 and 33. Such actions amount to waiver of the issue concerning the conduct of Jatoi's trial attorney.

Issues raised but not briefed are waived. The U. S. Supreme Court has on several occasions refused to grant a writ of *certiorari* in a case involving waiver under Federal Rule of Appellate Procedure 28(a)(5). That rule requires that the appellant's argument contain the reasons he deserves the requested relief "with citation to the authorities, statutes and parts of the record relied on." Failure to argue the point with authorities means that the point has been inadequately briefed, and is therefore waived. *See Weaver v. Puckett*, 896 F.2d 126, 127 (5th Cir.), *cert. denied*, ___ U.S. ___, 111 S.Ct. 427, 112 L.Ed.2d 411 (1990); *Brown v. Trustees of Boston University*, 891 F.2d 337, 352 (1st Cir. 1989), *cert. denied*, 496 U.S. 937 (1990); *United States v. Lindell*, 881 F.2d 1313, 1325 (5th Cir. 1989), *cert. denied*, 493 U.S. 1087 (1990). A bare listing of issues without supporting authorities is insufficient, and the claims are considered "abandoned" on appeal. *United States v. Ballard*, 779 F.2d 287, 295 (5th Cir.), *cert. denied*, 475 U.S. 1109 (1986). Appellate practice is not intended to include "notice pleading." *Id.* Mere sentences, without citation to authority, is not "argument." Mere restatements of motions made in a district court, without more, are waived. *Heller Financial, Inc. v. Midwhey Powder Co.*, 883 F.2d 1286, 1294 (7th Cir. 1989).

Jatoi has presented nothing new in Jatoi II. He has failed to brief any issue not presented in Jatoi I. He has waived any argument not presented in Jatoi I, by failing to present it here in Jatoi II. Dr. Jatoi is otherwise foreclosed on all issues raised in the first appeal by the Fifth Circuit's opinion previously rendered in Jatoi I, *Amega v. Jatoi*,, No. 91-1086 (5th Cir. August 23, 1991), which has become final. Jatoi's Petition should be denied.

### C. The trial court did not abuse its discretion in denying Jatoi's Rule 60(b) Motion.

Amega and Benedict believe that all issues presented by Jatoi in this appeal are foreclosed by the doctrines of "the law of the case" and waiver. However, should the Court choose to consider Jatoi's complaints concerning the denial of his Rule 60(b) Motion, Amega and Benedict assert that the Motion was properly denied, and that the trial court below did not abuse its discretion in denying the Motion.

The granting or denial of a Rule 60(b) Motion is addressed to the sound discretion of the district court, and in the absence of an abuse of discretion, an appellate court will not review the district court's determination. *Hand v. United States*, 441 F.2d 529, 531 (5th Cir. 1971) (*per curiam*). This is the same standard of review the Fifth Circuit used in Jatoi I, in reviewing the district court's decision on Jatoi's Motion for New Trial. *Amega v. Jatoi*, No. 91-1086, slip. op. at 4 (5th Cir. August 23, 1991) (found in Petitioners' Appendix at 63). Courts apply "an especially differential standard" in cases where motions directed to the sound discretion of the trial court are involved. *Id.*

A court does not abuse its discretion in denying a Rule 60(b) motion where no new facts are presented to the Court, or the facts presented are the same as when judgment was entered. *Forsythe v. Saudi Arabian Airlines Corp.*, 885 F.2d 285, 289 (5th Cir. 1989). Here, Jatoi complained (the first time) in his Motion for New Trial and other efforts to overturn the voluntary settlement that the judge and his lawyers "terrified" him. *See* letter dated November 9, 1990 from Jatoi to the Honorable Judge McBryde, found at Tab 7 of Appellant's Fifth Circuit Appendix, in Cause No. 91-7003. Jatoi's Rule 60(b) Motion did nothing other than expand on this first concept, in that Jatoi added a few allegations to his basic assertion that the trial court and his lawyers "coerced" him into settling his case. *Compare* Rule 60(b) Motion found at Appellant's Fifth Circuit Appendix, in Jatoi II, under Cause No. 91-7003, Tab 2, *with*

Jatoi's Motion for New Trial and letter to the Judge, found at Tabs No. 4 and 7, respectively, in that same Appendix. There was no abuse of discretion in the Judge's first decision related to the motion for new trial. There is likewise no abuse of discretion in the second decision on the Rule 60(b) Motion. The Judge, on essentially the same facts, simply denied Jatoi's meritless Rule 60(b) Motion. Jatoi's Petition should be denied.

### D. Rule 60(b) is not an excuse to re-litigate, and attorney conduct is not an excuse under Rule 60(b).

Amega and Benedict assert that Jatoi's claims are barred by the doctrines of law of the case and/or waiver, and that the Judge did not abuse his discretion in denying either Jatoi's Motion for New Trial or his Rule 60(b) Motion. Nonetheless, should this Court determine that Jatoi has not lost his appeal on these points, Jatoi should lose on the merits of his allegations -- which are none.

Dr. Jatoi claims in this appeal that Rule 60(b) allows him to vacate the consent judgment freely agreed to by him at trial. First, Amega and Benedict would point out that there must be a fairly strong showing made by the litigant seeking to vacate such a judgment, and simple financial "discomfort or inconvenience" is insufficient to vacate this judgment. *See SEC v. Hatch*, 128 F.R.D. 58, 63 (D.N.J. 1989); *C. Wright & A. Miller, Federal Practice and Procedure: Civil* §2863 at 207 (1973). A litigant may also not vacate a judgment simply because he is "unhappy". *Bernard v. Missouri Division of Employment Security*, 95 F.R.D. 107, 109 (W.D. Mo. 1982). *See also Wright & Miller, Federal Practice and Procedure,* §2858 at 170. Dr. Jatoi had no grounds for a new trial, and likewise has no grounds for a vacation of this consent judgment, or any other aspect of this appeal.

Jatoi has not properly briefed the point that his lawyer's action, or inaction, is grounds for granting a Rule 60(b) Motion. *See generally*, Petition for Writ at 20. That is understandable. There are numerous cases on the proper grounds for vacating a judgment under Rule 60(b) -- and it is settled that the actions of one's lawyer are just not within the allowed grounds. The following are clearly **not** grounds to vacate any settlement:

1. The actions of Jatoi's attorney -- either error, carelessness, or failure to call witnesses or introduce evidence, or object at trial. *Bernard v. Missouri Division of Employment Security*, 95 F.R.D. at 109; *See also, Pelican Production Corp. v. Marino*, 893 F.2d 1143, 1144 (10th Cir. 1990) (attorney's failure to act).

2. Malpractice of Dr. Jatoi's attorney. *Peake v. First National Bank and Trust Co.*, 101 F.R.D. 544, 545-46 (W.D. Mich. 1984); *Blinder, Robinson & Co. v. SEC*, 748 F.2d 1415, 1420 (10th Cir. 1984), *cert. denied*, 471 U.S. 1125 (1985) ("keeping this suit alive merely because plaintiff should not be penalized for the omissions of his own attorney would be visiting the sins of the plaintiff's lawyer upon the defendant," and that would be wrong).

3. The ignorance of Dr. Jatoi's attorney as to the law, or local rules -- such as his failure to properly designate deposition testimony (Transcript II-135-36), or decision not to call certain

witnesses (Transcript III-254). *See United States v. Erdoss*, 440 F.2d 1221, 1223 (2d Cir.), *cert. denied*, 404 U.S. 849 (1971) (a conscious decision made in ignorance of law is not grounds for Rule 60(b) motion).

4. Erroneous strategic or tactical decisions, such as Jatoi's decision to release all his witnesses during trial (Transcript III-254). *See Lloyd v. Carnation Co.*, 101 F.R.D. 346, 348-49 (M.D.N.C. 1984) (failure to submit certain evidence).

Jatoi is not entitled to "a second bite at the apple" merely because he is not satisfied with his attorney. *Id.* at 346; *Bernard*, 95 F.R.D. at 109. Rule 60(b) is not designed to operate as an insurance mechanism for dissatisfied clients. Its purpose is not to give relief to a client who does not happen to have the best lawyer for the job. The neglect or error of an attorney is the neglect or error of the client. *Link v. Wabash Railroad*, 370 U.S. 626, 633-34 (1962). Even if Jatoi's trial counsel, Mr. Curtis, was careless or negligent, he is the one who should be penalized through a malpractice suit. *Id.* at 634, n.10. Such a suit is believed to remain pending in a Tarrant County, Texas district court. *See* Motion and Brief of Aetna Insurance Company for Sanctions, filed in Cause No. 91-7003, at 3. The innocent parties -- Amega and all the other respondents -- should not suffer for Mr. Curtis' alleged "sins." *Link*, 370 U.S. at 634, n. 10.

Jatoi should not be allowed to use Rule 60(b) to relieve himself of the consequences of a voluntary settlement, his freely made litigation choices or his and his lawyer's

alleged improvident strategic decisions. Jatoi agreed not once, but twice on the record that this settlement was his decision. He had days to digest what was happening at trial, and several nights and recesses to discuss and contemplate settlement. *See, e.g.*, Transcript III-326 and 334 (two individual appearances and confirmations of assent to settle, separated by a recess). Dr. Jatoi's current protestations to the contrary, including his plea that he wanted more money, are merely the result of his mistaken belief that he had done Respondents no wrong, and owed them no money.

This litigation needs to end. As this very court put it over 40 years ago:

> There must be an end to litigation some day, and free, calculated, deliberate choices are not to be relieved from.

*Ackerman v. United States*, 340 U.S. 193, 198 (1950). Dr. Jatoi's Petition should be denied.

### E. The trial court committed no "plain error" and acted within its discretion in conducting the trial.

Amega and Benedict believe that Jatoi has already had his appeal on the conduct of his trial, and he lost it the first time. The Fifth Circuit not only found that Judge McBryde acted within his discretion in the complaints made by Jatoi on the first appeal, it also noted that objections to the Judge's conduct were not properly preserved. *Amega v. Jatoi*, No. 91-1086, slip op. at 10, n.4 (August 23, 1991) (Petitioners' Appendix at 74). Under the law of the case, the actions of Judge McBryde have already been found to be proper.

Nonetheless, if this Court is to consider Dr. Jatoi's complaints again, it should overrule them, for two reasons -- first, there is no "plain error" shown in the record, and

second, even if the objections made by Jatoi were properly preserved, Judge McBryde acted well within the scope of an ordinary federal district court trial judge. These will be addressed in turn.

The standard of review applicable to Jatoi's complaints about the conduct of the trial is "plain error." Jatoi acknowledges that no objections were made to the alleged conduct of Judge McBryde. *Id.* Failure of Jatoi to call the Court's attention to the alleged prejudicial comments and conduct limits any appellate court to ruling on "plain error." *Harris v. Steelweld Equipment Co.*, 869 F.2d 396, 402 (8th Cir.), *cert. denied*, 493 U.S. 817 (1989) (appellant's failure to object to court's alleged improper comments at trial waives the complaint, and the court is limited to review for "plain error"). Plain error is not shown on this record.

Judge McBryde acted within the scope of his basic duties to expedite a trial and to prevent unnecessary and duplicitous testimony. It is well settled that a federal court trial judge is not a mere presiding officer, but instead has as his function the conduct of a trial in an orderly way to elicit truth and to attain justice between the parties. *Faudree v. Irons City Sand & Gravel Co.*, 315 F.2d 647, 651 (3d Cir. 1963). A federal trial court judge must do five things: One, see that issues are not obscured; two, see that the trial is conducted in a proper manner; three, see that testimony is not misunderstood by the jury; four, check counsel in any effort to obtain an undue advantage or to distort evidence; and five, curtail unnecessarily long and tedious examinations of witnesses. *Id.* The last two functions are particularly relevant in this case. Judge McBryde merely exercised his proper functions, and all the complaining by Jatoi is really the result of his desire to avoid paying legitimate obligations, and to avoid living up to his word, given freely in a voluntary settlement.

One of Jatoi's main complaints is that Judge McBryde instructed counsel to limit the examination of witnesses to relevant issues. He spends over a page addressing this point. *See* Petition for Writ at 20-21. It is well settled that a trial court may instruct counsel to limit cross-examination to relevant issues. *Propst v. Greene*, 123 F.R.D. 535, 539 (W.D.N.C. 1988). It is even appropriate for the court to question witnesses to complete counsel's cross-examination, to limit counsel's questioning, and to exclude items from evidence which are "irrelevant" and a "waste of time." These are well within a trial judge's duties. *Id. See also Amega v. Jatoi*, No. 91-1086, slip op. at 10, found in Appendix at 73-74.

Jatoi also complains that Judge McBryde directed alleged coercive remarks to his lawyer and to witnesses at trial. *See* Petition at 20-21. A district court is allowed to create an orderly and expeditious presentation of evidence, and it is not an abuse of discretion to instruct witnesses to answer questions without digression, and by extension, to similarly instruct counsel. *Haney v. Mizell Memorial Hospital*, 744 F.2d 1467, 1477 (11th Cir. 1984). The scope and extent of cross-examination is well within the sound discretion of a trial judge, and will not be generally disturbed on appeal. *See, e.g., United States v. Phelps*, 733 F.2d 1464, 1471 (11th Cir. 1984).

Judge McBryde's comments directed to the litigants related to settlement were also proper at law. *See Amega v. Jatoi, supra*, op. at 10 (found in Appendix at 74). Jatoi's complaint that he was "coerced" by the court is "frivolous." *Id.* It is always proper for a court to show litigants the disadvantages of a fight to the finish, and to encourage settlement and conciliation between the parties. *See* Fed.R.Civ.P. 16(a)(5) and (c)(7) (district court may direct parties and attorneys to appear at conference for purposes of facilitating settlement). This Court has denied certiorari in similar cases.

*See Ullman v. Olwine, Connelly, Chase, O'Donnell & Weyher*, 123 F.R.D. 253 (S.D. Ohio 1987), *aff'd*, 857 F.2d 1475 (6th Cir. 1988), *cert. denied*, 489 U.S. 1080 (1989) (mere suggestion of settlement discussions is not coercion). The district court was well within its discretion.

Since Judge McBryde acted well within his discretion as a trial judge, and since an attorney's acts, even neglect, are not grounds for granting a Rule 60(b) Motion, Jatoi's Petition should be denied.

### F. The law favors settlement.

Jatoi claims in this second appeal of this litigation that he somehow has the right to avoid a settlement freely made and upon which other parties have relied. The Fifth Circuit was correct in rejecting both the first and second appeals by Jatoi. The parties had accepted the settlement in a final, complete conclusion of the case. The money that the parties were fighting over has been disbursed. Record 002420. Trial exhibits and demonstrative evidence were released to the parties. Transcript III-337-338. Forty-three volumes of depositions and hundreds of exhibits were returned to the state district court following the trial. Record 001957. This case is over, and it should remain over.

There is little more sacred and established law than that law holding settlements to be favored. The basic and century-old principle is the same as the U.S. Supreme Court itself once held -- where the parties, acting in good faith, settle a controversy, the courts will enforce the compromise **without regard to what the result might have been had the parties chosen to litigate to the end.** *Hennessy v. Bacon*, 137 U.S. 78 (1890), cited by *Terrain Enterprises, Inc. v. The Western Casualty and Surety Co.*, 774 F.2d 1320, 1321 (5th Cir. 1985), *cert. denied*, 475 U.S. 1121 (1986).

This settlement should be affirmed. Jatoi should not be allowed to escape his obligations, especially where he expressed not once but twice on the record that he approved the settlement of this case. Transcript III-326, 334. The Fifth Circuit has already spoken on this issue in a final judgment. *See Amega v. Jatoi*, No. 91-1086 (August 23, 1991). Jatoi's Petition should be denied.

## III. THE FEDERAL COURTS HAVE THE INHERENT POWER TO SANCTION LITIGANTS FOR FRIVOLOUS APPEALS.

Dr. Alimadad Jatoi claims in his Petition for Writ that sanctions against him were inappropriate and violate his rights as a litigant. That is not true. The Federal Rules of Appellate Procedure have long allowed the imposition of sanctions, including the assessment of attorneys' fees and costs, for frivolous appeal. *See, e.g.*, Fed.R.App.Proc. 38. Federal circuit courts have not hesitated to assess penalties against an appellant for prosecuting a frivolous appeal, including the Fifth Circuit Court of Appeals, which imposed sanctions on Dr. Jatoi. *See, e.g., Foret v. Southern Farm Bureau Life Insurance Co.*, 918 F.2d 534 (5th Cir. 1991); *Coghlan v. Starkey*, 852 F.2d 806 (5th Cir. 1988).

This Court has denied the petition for writ of certiorari in other similar sanctions cases. In *Clarion Corp. v. American Home Products Corp.*, 494 F.2d 860 (7th Cir.), *cert. denied*, 419 U.S. 870 (1974), a stubborn litigant appealed for a second time a judgment entered pursuant to a voluntary settlement. As is the case with Dr. Jatoi, the appellant in *Clarion* claimed that the settled case had been mishandled by former attorneys. The Seventh Circuit did not hesitate to impose Rule 38 penalties, and this Court did not disturb that assessment, once the Seventh Circuit found that the appellant's course of action "has been frivolous and obstructive and has caused a shameful waste of judicial

manpower." *Id.* at 865. *See also Trecker v. Scag*, 747 F.2d 1176 (7th Cir. 1984), *cert. denied*, 471 U.S. 1066 (1985) (assessing attorneys' fees and double costs as penalties against appellant's counsel for frivolous appeal, the second appeal in that matter).

Respondents believe this case is one that is very appropriate for the imposition of sanctions by an appellate court. Unfortunately, the actions of litigants such as Dr. Jatoi are all too common in the federal system. Without significant penalties imposed for delay and frivolity, litigants are free to drive up the costs of collection of legitimate obligations. Respondents believe that a neutral review of the facts of this lawsuit will show that Dr. Jatoi's claim is not only without merit, it has been pursued solely to frustrate Respondents in the collection of valid debts.

The purposes of sanctions were well and thoughtfully expressed in *Natasha, Inc. v. Evita Marine Charters, Inc.*, 763 F.2d 468, 471-73 (1st Cir. 1985). One purpose is to encourage attorneys both to police their own determinations whether to appeal and to discourage their clients from taking bootless appeals. The attorney who was sanctioned by the Fifth Circuit -- Michael Cooper -- has not appealed the sanctions against him.

A second purpose of sanctions is to compensate for the risk that defendants such as Dr. Jatoi may resist well-founded claims simply in hopes of wearing down their adversaries, knowing that the costs of collection may prove prohibitive. *Id.* In this case, the attorneys' fees through trial alone exceeded $400,000. See Tr. III-328. Given the fixed amount available in escrow, approximately $1.25 million, these attorneys' fees amount to a large share of the potential recovery by Respondents. "Frivolous" and "thinly disguised" abuse of the judicial process ought not to go unpunished. *Aetna Insurance Co. v. Jatoi*, No. 91-7003, slip op. at 2-3 (5th Cir. June 30, 1992), found in Appendix at 79.

In the face of these concerns, Respondents feel that the Fifth Circuit appropriately awarded fees and costs to Respondents as sanctions against Dr. Jatoi and his counsel. Dr. Jatoi had an adequate opportunity to respond to Respondents' Motions, and in fact did respond to the Motions. *Id.* at 2-3, found in Appendix at 79-80. *See also, Aetna Insurance Co. v. Jatoi*, No. 91-7003, slip op. at 2 (5th Cir. July 21, 1992), found in Appendix at 84. There is no due process or other violation here, especially where Dr. Jatoi was notified of the pending motions, and responded in defense.

The issues raised by Jatoi's petition involve matters of law which are well settled by prior decisions within the federal system, and do not involve any conflicting state or federal decisions at all. Jatoi's petition should be denied.

## IV. SANCTIONS FOR A FRIVOLOUS PETITION ARE APPROPRIATE.

Supreme Court Rule 42.2 provides that "just damages" and single or double costs may be awarded to the appellee or respondent when an appeal or petition for certiorari is "frivolous." Two of the three appeals presented in this Petition are clearly time-barred, and the third is subject to well-settled principles such that it too should never have been filed.

This Court has shown an increasing desire to discourage frivolous petitions for writ of certiorari. *See, e.g., Hyde v. Van Wormer*, 474 U.S. 992 (1985). An award of costs or other damages seems appropriate under these circumstances.

## CONCLUSION

The questions that Petitioners raise are neither special nor important. Two of the three judgments for which a writ of certiorari is sought are time barred under the express rules of this Court. The third judgment involves no unsettled questions of law and is entirely consistent with the prior rulings of courts within the federal system and this Court on the issues presented concerning waiver, law of the case, and sanctions. There is no violation of any provision of the United States Constitution. Accordingly, the Petition should be denied, and costs or other damages awarded to Respondents.

Respectfully submitted,

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(3)

Supreme Court, U.S.
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No. 92-898

In The

# Supreme Court of the United States

October Term, 1992

ALIMADAD JATOI and ALCINA JATOI,

*Petitioners,*

vs.

AMEGA CONSTRUCTION, INC.

and

AETNA INSURANCE COMPANY,

*Respondents.*

**Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## BRIEF IN OPPOSITION OF RESPONDENT AETNA INSURANCE COMPANY

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## QUESTIONS PRESENTED

1. Whether a litigant who has voluntarily settled a case in open court can renege on that settlement by claiming that the District Court's conduct of trial proceedings coerced the settlement and denied him due process of law.

2. Is a Court of Appeals correct in affirming the denial of a Rule 60(b) Motion and sanctioning a litigant for filing a frivolous appeal where the litigant has used Rule 60(b) to seek reversal of a District Court's judgment which was previously upheld on appeal?

The remaining questions presented to this Court by Petitioner (Petitioner's Questions 2 and 4) are not addressed in this brief since they were the subject of two other determinations by the United States Court of Appeals for the Fifth Circuit in Cases Nos. 91-1086 and 91-1057. On November 18, 1991, Justice Scalia denied Petitioner's application for an extension of time within which to file a petition for a writ of certiorari, thereby prohibiting review of a petition for a writ of certiorari for Case No. 91-1086 and Petitioner's Question No. 2. Moreover, on April 23, 1992, the Fifth Circuit denied Petitioner Alcina Jatoi's Motion to File Brief Out of Time and granted Respondent Amega Construction, Inc.'s Motion to Dismiss the Appeal. Pursuant to Supreme Court Rule 13.4, Petitioner Alcina Jatoi's time for filing a petition for a writ of certiorari on the community property issue (Jatoi's question No. 4) expired on July 23, 1992.

## LIST OF PARTIES

The undersigned counsel of record certifies that the following listed persons were parties to the proceeding in the court the judgment of which is sought to be reviewed.

Aetna Insurance Company – Third Party Defendant/ Respondent

Amega Construction, Inc. – Plaintiff/Respondent

Benedict Industries, Inc. – Intervenor/Respondent

Pioneer Concrete of Texas, Inc. – Intervenor/Respondent

Alimadad Jatoi – Co-Defendant/Petitioner

Alcina Jatoi – wife of Alimadad Jatoi, Co-Defendant/ Petitioner,

The Jatoi Partnership – Co-Defendant

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## STATEMENT OF THE CASE

### I. Procedural History

The United States Court of Appeals aptly summarized the tangled and tortured course of this litigation as a "lengthy litany of ludicrous litigiousness" of which it is hoped that this petition by Petitioners, Alimadad Jatoi and Alcina Jatoi ("Jatoi"), is the last invocation. Despite having been sanctioned by the Fifth Circuit for the absurdity of his appeals from his voluntary settlement, Jatoi doggedly persists in dragging Respondent, Aetna Insurance Company ("Aetna"), and Respondent, Amega Construction, Inc. ("Amega"), through yet another briefing of his tired arguments. While it is true that the United States Constitution guarantees to every person the right to redress their grievances in court, it is inconceivable that those drafting the Fifth Amendment envisioned that the right would be abused to the extent it has been in this case by Jatoi. The filing of this Petition for a Writ of Certiorari is Jatoi's eighth attempt to obtain nullification of a voluntary settlement he entered into, in open court, in November 1990.[1]

This litigation originated in 1985 in the 236th Judicial District Court of Tarrant County, Texas when Amega brought suit against Jatoi, seeking recovery of the balance of a contract for the construction of an office building. Amega also sought foreclosure of mechanics liens filed

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[1] Due to the shear absurdity and complexity of Jatoi's abuses of the judicial process, a flow chart is attached as Appendix A in order to aid the Court in sifting through Jatoi's "smoke and mirrors" which have been used by him in an attempt to camouflage his dishonest and questionable business practices.

against the project to secure the outstanding contract balance. Jatoi counterclaimed, alleging that Amega breached the Jatoi-Amega contract by failing to perform work in compliance with the plans and specifications of the construction contract. Jatoi also sought recovery under the Texas Deceptive Trade Practices and Consumer Protection Act ("DTPA").

Approximately $1,250,000 of the proceeds from the Jatoi construction loan, an amount sufficient to cover the amount of the liens against the property, were escrowed by USLife Title Company at the closing on Jatoi's permanent financing. These funds were later deposited into the registry of the United States District Court for the Northern District of Texas, Fort Worth Division, and the parties' entitlement to those funds was the basic issue which was eventually tried to that Court.

In November, 1986, the State District Court ordered the payment of the claims of unpaid subcontractors which had intervened in the litigation. The claims between Amega and Jatoi were set for trial in state court in June, 1987, but in an eleventh hour attempt to delay trial, Jatoi filed a third party petition against Aetna which had issued payment and performance bonds for Amega for the project. Jatoi asserted a breach of contract action against Aetna on the bonds, as well as breach of the covenant of good faith and fair dealing, and violation of Art. 21.21 of the Texas Insurance Code and the DTPA. Aetna counterclaimed against Jatoi for its attorneys' fees for the bad faith filing of causes of action under Art. 21.21 and the DTPA.

On August 4, 1987, Jatoi filed a voluntary petition under Chapter 11 of the Bankruptcy Code. The case was then removed to the United States District Court for the Northern District of Texas, Fort Worth Division, and was referred to the United States Bankruptcy Court. After Jatoi added a RICO claim to his causes of action against Amega, the District Court, on Motion of Aetna, withdrew the reference on April 15, 1988, placing the case on the District Court's docket for trial.

Trial commenced on November 5, 1990, before the Honorable Judge John McBryde. On the evening of November 7, 1990, after both Amega and Jatoi presented part of their respective cases, a settlement was reached between the parties as to the disposition of the funds in the registry of the Court. At that time all parties affirmed the settlement in open court. Jatoi himself acknowledged his agreement to the settlement on the record. The terms of the settlement were confirmed in a final order dismissing with prejudice all claims in the litigation which was entered by the Court on November 8, 1990. Despite his open court affirmation of the settlement, Jatoi filed a Motion for New Trial or to Alter or Amend the Judgment on November 19, 1990. The District Court denied that motion on December 17, 1990.

Jatoi appealed the denial of the Motion for New Trial or to Alter or Amend the Judgment to the Fifth Circuit on January 16, 1991. The case was assigned Case No. 91-1086. While the Court considered the appeal, on May 5, 1991, Jatoi filed a Rule 60(b) Motion with the District Court. On June 25, 1991, Jatoi's Rule 60(b) Motion was denied. Undaunted, Jatoi filed a Motion for Reconsideration of his Rule 60(b) Motion in the District Court on July

1, 1991. On August 8, 1991, the District Court denied the Motion for Reconsideration. On August 23, 1991, the Fifth Circuit affirmed the December 1990 denial of the Motion for New Trial in Case No. 91-1086. In the meantime, on October 21, 1991, the District Court informed all parties that the record on Jatoi's Rule 60(b) Motion had been filed with the Fifth Circuit. This appeal was given Case No. 91-7003.

Apparently, Jatoi did not think two appeals of the same issues were enough, so on November 5, 1991, Alcina Jatoi, obviously at the behest of her husband, filed her own Rule 60(b) Motion with the District Court. In her motion, Alcina Jatoi raised essentially the same grounds for vacation of the District Court's order confirming the voluntary settlement of the litigation as were raised in Alimadad Jatoi's Rule 60(b) Motion (now Case No. 91-7003) *and* those raised in the 91-1086 appeal. While Alcina Jatoi's motion was pending before the District Court, Jatoi requested an extension of time from this Court to file a petition for a writ of certiorari asking this Court to review the determination of the Fifth Circuit in Case No. 91-1086 and, consequently, the trial court's entry of the order regarding the voluntary settlement. Jatoi's request was denied by Justice Scalia on November 18, 1991.

On December 7, 1991 Jatoi received notice that the District Court denied Alcina Jatoi's Rule 60(b) Motion. A third appeal was filed by Jatoi in January, 1992, appealing the denial of Alcina Jatoi's Rule 60(b) Motion. The case was given Case No. 92-1057 by the Fifth Circuit. In April 1992, the Court denied Alcina Jatoi's Motion to File Brief Out of Time. The Fifth Circuit was now becoming weary

of Jatoi's frivolous procedural wranglings, as were Aetna and Amega which filed motions for sanctions with the Fifth Circuit.

In June 1992, the Fifth Circuit correctly dismissed 91-7003 and sanctioned Jatoi for filing a frivolous appeal indicating that his "ludicrous litigiousness" must end. In July 1992, Jatoi, despite the warnings of the Fifth Circuit, filed his Petition for a Writ of Certiorari which is now the subject of this Court's review. The first brief filed by Jatoi in September 1992 failed to conform to this Court's requirements and a corrected and redrafted brief was served upon Aetna on November 24, 1992. It is this brief to which Aetna now responds.[2]

## II. Statement of Facts

This fourth appeal involves yet another attempt by Jatoi to undo a settlement into which he entered voluntarily after three days of trial. Over the course of those three days, it became patently obvious to every person in the courtroom – Judge, jury, parties, counsel and finally Jatoi himself – that Jatoi had no chance of prevailing on the merits. Faced with the possibility of no recovery on

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[2] It is Aetna's understanding from its counsel's discussion with the office of the Clerk of this Court that it need not respond to aspects of Jatoi's Petition which deal with Case No. 91-1086 or 92-1057 since time has expired on those Appeals. Thus Aetna does not respond to Jatoi's Questions Nos. 2 and 4. Further, it is Aetna's understanding that the time period for responding to Jatoi's Petition began to run on the date that the redrafted brief was received by Aetna on November 24, 1992. Attached at Appendix B to this brief is Aetna's counsel's correspondence, dated December 10, 1992, confirming this understanding.

his own claims against Amega and Aetna, or worse yet, a judgment against him for attorneys' fees of Amega, and even Aetna, Jatoi accepted a settlement offer to which he himself agreed on the record in open court. Trial Transcript, Vol. III, Page 334.[3] By way of appeal (for the fourth time) Jatoi now seeks to renege on that settlement, claiming that the conduct of the trial by the District Court was so unfair that Jatoi was coerced into settling.

The transcript, when read as a whole, simply does not support Jatoi's claims and never has. Rather, the transcript establishes that even though it maintained relatively strict controls over the proceedings, the District Court treated all parties fairly and equally. It was the woeful lack of merit of Jatoi's claims which led to a settlement of the case prior to its submission to the jury. Throughout the arguments made in his Petition for a Writ of Certiorari, Jatoi attempts to paint a picture of biased and unfair treatment by the District Court of both Jatoi and his counsel leading to his counsel's "abandonment" of him. Upon review of the record, however, it becomes clear that the settlement was by no means involuntary. Rather, it was made as a result of strategy in light of the course which the trial proceedings had taken, a course adverse to Jatoi.

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[3] References to the transcript of the trial will be designated "Tr.Vol. ___."

## SUMMARY OF ARGUMENT

Jatoi claims that the voluntary settlement he entered into two years ago should be nullified because the District Court's actions intimidated both him and his counsel. Specifically, Jatoi claims that the District Court's actions in controlling the proceedings, excluding evidence, advising Jatoi as to his Fifth Amendment rights and intimidating his counsel coerced him into settling. Jatoi also claims that the sanctions imposed upon him by the Fifth Circuit in the second appeal of the same issues were inappropriate.

The Fifth Circuit Court of Appeals three times rejected Jatoi's feeble attempts to blame the District Court for coercing a settlement. In its first opinion in Case No. 91-1086, the Fifth Circuit stated the law of the case which is binding upon Jatoi, i.e., that the District Court's comments concerning settlement were well within its discretion. The same is true of Jatoi's claim regarding the District Court's careful instructions to him as to his Fifth Amendment rights. The Fifth Circuit, on the 91-1086 appeal, resoundingly rejected Jatoi's contention that through this instruction, the District Court intimidated him and his counsel to the point that they settled. The Fifth Circuit twice found this contention to be "frivolous." Jatoi must be barred from pursuing this frivolous argument based on the law of the case.

Jatoi complains of other conduct on the part of the District Court which he claims to be coercive, including the Court's exclusion of evidence pertaining to Jatoi's interpretation of the contract documents; refusal of the

District Court to allow repetitious and cumulative testimony; and the Court's threat of contempt to Jatoi's trial counsel for numerous side-bar remarks. This conduct was raised as a ground for relief for the first time in Jatoi's Motion for Rule 60(b)(6) relief. Jatoi's contentions in this regard are equally frivolous as found by the Fifth Circuit in its unpublished opinion from which this appeal is taken. Faced with the same worn out arguments as the prior appeal (Case No. 91-1086), the Fifth Circuit clearly did not abuse its discretion in dismissing Jatoi's second appeal and sanctioning such conduct.

## ARGUMENT

**I. THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT WAS CORRECT IN DISMISSING JATOI'S APPEAL AND SANCTIONING JATOI SINCE THE TRIAL COURT'S CONDUCT IN THIS CASE WAS NOT COERCIVE OR IMPROPER AND DID NOT OTHERWISE INTIMIDATE JATOI OR HIS COUNSEL SUCH THAT THE SETTLEMENT REACHED IN THE COURT BELOW SHOULD BE NULLIFIED.**

The Fifth Circuit found Jatoi's allegations that the District Court acted improperly to be meritless. Due to the fact that such allegations had already been presented to the Court once, the Fifth Circuit found Jatoi's arguments to be "unsupported, conclusory accusations of misfeasance and malfeasance" were "wasteful and abusive." See Jatoi's Appendix B, 80-81. The record below clearly demonstrates the weak position of Jatoi before the jury

and both Jatoi and his trial counsel saw the writing on the wall so they settled.

This Court's review of the determination as to the voluntary nature of the settlement is governed by standards set out in Fed. R. Civ. P. 61, which provides that no action by the trial court is ground for vacating or modifying a judgment or order, "unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." A trial court's action on a Rule 60(b) Motion can be set aside only for a clear abuse of discretion by the trial court. *Edwards v. Joyner,* 566 F.2d 960 (5th Cir. 1978); *Hand v. United States,* 441 F.2d 529 (5th Cir. 1971).

Rule 60(b)(6) provides for an extraordinary remedy and may be invoked only upon a showing of exceptional circumstances. *Ackermann v. United States,* 340 U.S. 193, 202 (1950). In *Ackermann,* the United States Supreme Court stated that even though hindsight may indicate to a litigant that his decision was probably wrong, "there must be an end to litigation some day, and free, calculated, deliberate choices are not to be relieved from." *Id.* 340 U.S. at 198-99. Likewise, Jatoi should not be allowed to relieve himself of his own choice to settle this case at the expense of Aetna and Amega.

The District Court's actions and its Order should be accorded even greater deference under the above standards of review due to the long and protracted history of this case which concluded with an agreed settlement, not

to mention the tortured path of the appeals taken in this matter. Federal courts have traditionally exercised the power to encourage settlement, and the court's role in the settlement process was codified in the 1983 amendments to Fed. R. Civ. P. 16 when Subsection (c)(7) was added to encourage pretrial settlement discussions. *Kothe v. Smith,* 771 F.2d 667 (2nd Cir. 1985). The District Court's comments to the parties as to settlement never went beyond the spirit of Rule 16 (Tr.Vol. III-324), and certainly nowhere near the level of coercion in the *Kothe* case, the case upon which Jatoi places primary reliance.

Jatoi cites *Kothe v. Smith* for the universal proposition that judges should not strong-arm settlements of civil lawsuits by coercion. However, beyond this generally accepted legal chestnut, the case does little to support Jatoi's argument. There, the judge actually imposed sanctions upon a defendant for waiting until trial had begun before settling the case, contrary to the court's prior threat to sanction the parties if they refused to settle at a comparable figure prior to trial. More accurately, the defendant in *Kothe* went ahead and settled at trial *despite* the threat of sanctions and not because of it. More importantly, the Second Circuit was not so much concerned with the trial court's efforts to settle the case, but rather with its choice of tactics to do so, the coercive threat of sanctions. Of course, the District Court engaged in no such conduct during this trial. The threat of sanctions never passed the Court's lips and it approached the issue of settlement carefully and courteously, even to the point of expressing to Jatoi its hesitance to bring it up. Tr.Vol. III-324.

A case much more on point is *Ullmann v. Olwine, Connelly, Chase, O'Donnell & Weyher*, 123 F.R.D. 253 (S.D. Ohio 1987), *aff'd*, 857 F.2d 1475 (6th Cir. 1988), *cert. denied*, 489 U.S. 1080 (1989), which involved a claim for sex discrimination brought by an attorney against her former law firm. As in the case at bar, the *Ullmann* litigation proceeded to trial and near the end of the plaintiff's case, the magistrate hearing it inquired of both counsel if there was any possibility of settlement. Extended recesses were then taken and later in the afternoon a settlement was reached. The plaintiff explicitly stated on the record that she intended to settle. The case came before the district court on a subsequent motion by the defendants to enforce the settlement agreement. The plaintiff opposed enforcement of the settlement on various grounds, including that the settlement was coerced by the threat of sanctions and that she had insufficient time to consider the issues so that the settlement was not voluntary on her part. The *Ullmann* court rejected this argument, stating:

> Certainly thousands of cases in this country are settled every year after trial begins, and frequently it is the Court which initiates such discussions. *A suggestion of settlement discussions is not a threat of sanctions.* [Emphasis added.]

*Id.* at 259.

The court went on to observe that "if there was any objective coercion of plaintiff (as opposed to her subjective impressions), *it was from the circumstances in which she found herself.*" [Emphasis added]. The court pointed to the fact that the plaintiff's case had been poorly prepared for trial and was substantially undermined by her own

admissions on deposition and her failure to have key witnesses present or preserve their testimony. Much the same can be said here. Jatoi's settlement was a product of the virtual collapse of his case before the jury, and both he and his trial counsel were aware of it. As in the *Ullmann* case, Jatoi's after-the-fact subjective impressions that he was "coerced" by the District Court are a transparent effort to obtain a larger settlement.

Contrary to Jatoi's argument, the mere settlement of the case at the District Court's suggestion does not constitute a sanction sufficient to support a litigant's claim of a coerced settlement by that Court. Jatoi relies on *In re Ashcroft*, 888 F.2d 546 (8th Cir. 1989), to claim that his settlement was coerced by the District Court. However, the court's level of participation in settlement discussions in *Ashcroft* was much more pervasive than in the case at bar. There, the district court actually imposed the terms of settlement on the parties by informing them that "the Governor would be dismissed as a Defendant if he paid $500.00 in settlement to the Plaintiff." *Id.* Nevertheless, the Eighth Circuit indicated that if the case had actually settled, even this type of coercion "would disappear." Here, the District Court did not dictate terms of the settlement to the parties; rather, it encouraged negotiations to take place, negotiations in which the Court never directly participated. Tr.Vol. III-324.

At the time that the settlement between Jatoi, Amega and Aetna was entered into the record in the District Court, Jatoi had every opportunity to express his dissatisfaction with it. The court addressed a similar issue in *Broad v. Conway*, 675 F.Supp. 768 (N.D. N.Y. 1987), *aff'd*, 849 F.2d 1467 (2d Cir. 1988), *cert. denied*, 488 U.S. 927

(1988). In that case, the court held that the plaintiffs were estopped from raising the issue of coercion since at the time of entry of the settlement into the record, the court had questioned them as to their agreement and understanding of the settlement, and no objection had been raised at that time.

The same occurred here, and for the first time in these proceedings, Jatoi claims that, although he was present in the courtroom at the time the settlement was read into the record, he was not "with the group reading the settlement into the record but was 10-15 feet away" and may not have been fully informed about the actual settlement. This argument is preposterous. It is clear from the record that Jatoi, after encouragment from the Judge to consider settlement, gave his attorney the authority to settle and affirmed *on the record* that his attorney in fact had authority to do so. Tr.Vol. III-323 - 326. Jatoi himself indicated to the Judge that he wished to settle the case. Tr.Vol. III-326. Jatoi's attorney even made sure that Jatoi had read over the settlement to make sure it was acceptable. Tr.Vol. III-327. Clearly, Jatoi understood the settlement being entered into at the time. Raising even more doubt as to the veracity of Jatoi's assertions regarding settlement is Jatoi's contention that the Judge was not at the bench when the settlement was read into the record. Petition for Writ of Certiorari, 52. It is clear from the trial transcript that the Judge was directing the reading of the settlement and explicitly asked counsel to put the terms of the settlement into the record. Tr.Vol. III 328-329.

Moreover, once the terms of the settlement were read by counsel for Amega, the District Court, still on the bench, clarified them and explicitly informed all parties

that "this case in all respects will be dismissed tonight because we are going to be discharging the jury in the morning, and I don't want there to be any uncertainty about this lawsuit being concluded when we discharge that jury." Tr.Vol. III-332. The Court then went on to question each of the parties as to their understanding of the settlement. Jatoi explicitly affirmed that the statement of counsel for Amega and the Court's clarification accurately described the settlement. Tr.Vol. III-334. He gave no indication at that time that he had somehow been coerced into settling or could not understand or hear what was happening. Jatoi's settlement was not an ill-considered snap decision based on lack of understanding or auditory dysfunction. To allow him to renege on his agreement would undermine the integrity of the judicial system. The District Court's remarks as to settlement did not affect the substantial rights of Jatoi and were not an abuse of discretion sufficient to allow Jatoi to renege on his voluntary agreement.

Jatoi also argues that by instructing him as to his Fifth Amendment rights, the District Court intimidated him so that he was robbed of his ability to understand the settlement and was in effect coerced into entering into it. The District Court, having been in the best position to observe Jatoi's demeanor during the entire course of events at trial, quite rightly denied that motion. Jatoi made the same arguments on his appeal in 91-1086, which were found by the Fifth Circuit to be frivolous. This Court should likewise deny him relief. Under the authority cited above with regard to Fed. R. Civ. P. 61, the District Court's instructions do not affect the substantial rights of the parties, nor were they an abuse of discretion.

The Fifth Circuit has upheld on numerous occasions the authority of a United States District Judge to instruct a witness as to his Fifth Amendment right against self-incrimination. This is because the trial judge " . . . is present as the embodiment of the Constitution, and charged with the firm duty to see that the rights of all are upheld, including the parties, the witnesses and the public. Whether and to whatever extent it may be the duty of the trial judge to caution a witness about his fifth Amendment rights, a careful one never hesitates." *United States v. Wilcox*, 450 F.2d 1131 (5th Cir. 1971), *cert. denied*, 405 U.S. 917 (1972).

In this case, the Fifth Circuit correctly observed that the District Court did nothing more than fulfill its duties. A fair reading of the Court's voir dire of Jatoi simply illustrates a pattern of careful questioning in order to satisfy the Court that Jatoi in fact understood his rights. Tr.Vol. III-310-312. The need for additional questioning and instruction is obvious from Jatoi's somewhat rambling response to the Court at lines 16-22 of page 311. The District Court's actions exhibit an obvious concern over Jatoi's ability to understand his rights.

Moreover, contrary to Jatoi's post-trial contentions, it does not appear that Jatoi was in any manner pressured or intimidated by the Court's instructions to him on his Fifth Amendment rights. In point of fact, in response to the Court's instructions, he clearly stated that he intended to proceed and answer Mr. Wetzel's questions,

Tr.Vol. III-308 and, Jatoi never did have occasion to actually invoke his Fifth Amendment rights.[4]

Jatoi complains of other actions on the part of the District Court which he claims contributed to some sort of coercive atmosphere which forced him to settle. Jatoi complains that the District Court's threat of contempt and prevention of repetitious examination so intimidated his counsel that Jatoi was forced to settle.

The District Court's threat of contempt to Jatoi's counsel outside the hearing of the jury (Tr.Vol. II-103) was not error. *Steinberg v. United States*, 162 F.2d 120, 123 (5th Cir. 1947), *cert. denied*, 32 U.S. 808 (1947). Even after the threat of contempt, Jatoi's trial counsel continued to represent his client despite the glaring weaknesses of Jatoi's case and the fraudulent character of his client, which were emerging in front of the jury. Jatoi's counsel argued vigorously against the admission of evidence. Tr.Vol. III-207-209. He also argued against the lumping together of an unsigned change order with three signed change orders for purposes of calculating the unpaid balance of $1,067,121 due under the Jatoi-Amega Contract. Tr.Vol.

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[4] At pages 29-30 of his Petition, Jatoi paraphrases his recollections of his private conferences with his trial counsel, as set out in his Affidavit in Support of his Rule 60(b)(6) Motion. Apparently, Jatoi includes these excerpts in order to demonstrate what he believes to be inadequacy of his trial counsel team. However, these types of facts are not sufficient to justify the overturning of a voluntary settlement. Rather, if anything, they may support a cause of action on behalf of Jatoi against his trial counsel for malpractice. This issue is discussed *infra*.

III-214-216. Mr. Curtis also argued against the admissibility of the testimony of Dr. Allen Self, Amega's economics expert. Tr.Vol. III-228-241.

Jatoi makes much of a "serious conflict" which, he claims, developed between him and his counsel, citing Tr.Vol. III-179-180, and that Mr. Curtis "virtually abandoned" Jatoi to his former lawyer, Mr. Richard Trickey, who was present as a witness for Jatoi. Petition for Writ of Certiorari, 21-23 and 27-28. Again, Jatoi mischaracterizes the efforts of his former counsel. At page 179 of the transcript, Mr. Curtis explains to the Court that contrary to his advice, Jatoi desired to testify on his own behalf and as to matters which had already been excluded by the rulings of the Court. In addition, far from "abandoning" Jatoi to his former attorney, Mr. Trickey, Mr. Curtis simply asked for permission for Mr. Trickey to assist Mr. Curtis in advising Jatoi since he was obviously experiencing difficulty in controlling his client.

What Jatoi now chooses to term as "intimidation" of his counsel was actually a strategy by Mr. Curtis to prevent the possibility of further damage to his client through taking the stand on his own behalf and subjecting himself to further cross-examination. Despite his counsel's own advice, Jatoi insisted on testifying. Undoubtedly, the District Court shared some of the same concerns over the strength of Jatoi's case when it suggested to Jatoi that he consider acceptance of an outstanding settlement offer from Amega. Jatoi expressed his unwillingness to accept such an offer, and nevertheless the District Court assured him that he was going to "continue to hear Jatoi's case and keep an open mind, but that doesn't mean I am going to bend the rules." Tr.Vol.

III-186. The Court then gave Jatoi additional time to discuss settlement with his counsel. Still, Jatoi declined to settle. Tr.Vol. III-186-187. Unfortunately for Jatoi, the continuation of the trial only confirmed the wisdom of his counsel's advice both as to not taking the stand and settling the case.

Jatoi complains that the District Court's efforts to streamline the trial by preventing repetitious or cumulative testimony ultimately had the effect of adding to the intimidation of Jatoi's counsel. Petition for Writ of Certiorari, 16.

From the outset, the District Court made clear its intention to move the trial proceedings along. It instructed all counsel prior to voir dire that repetitious and cumulative testimony would not be allowed. Tr.Vol. I-55-56. At the same time, the District Court was sensitive to the impact that its efforts to control the proceedings might have on the jury and it carefully instructed the jury that any of its rulings or admonishments of counsel should not affect their evaluation of the merits of the case. Tr.Vol. I-161-162. Thus, all concerned were put on notice of the Court's intention to actively exercise its discretionary power to control the trial in order to avoid needless waste of the jury's and Court's time.

A federal judge's latitude in controlling the trial is codified in F.R. Evid. 611(a) which provides:

> (a) **Control by Court.** The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3)

protect witnesses from harassment or undue embarrassment.

The Fifth Circuit addressed the scope of a district court's powers in this regard on numerous occasions. In *Liner v. J. B. Talley & Co.*, 618 F.2d 327 (5th Cir. 1980), *reh. denied*, 623 F.2d 711 (5th Cir. 1980), it upheld the trial court's broad discretion to exclude even relevant testimony if it is cumulative or repetitious, stating that where an appellant made no offer of proof as to excluded testimony, "error may not be predicated on its exclusion." Here, no offer of proof was ever made by Jatoi's counsel so that Jatoi is precluded from complaining of any abuse by the District Court of its discretion since Jatoi's failure to object prevented the court from remedying the situation at that time. *Reese v. Mercury Marine Div. of Brunswick, Corp.*, 793 F.2d 1416 (5th Cir. 1986), *reh. denied*, 797 F.2d 977 (5th Cir. 1986).

There was clearly no plain error in the District Court's adherence to the rule against repetitious and cumulative testimony. Thus, the Fifth Circuit correctly ruled that there had been no overreaching by the District Court. *Ruiz v. Estelle*, 679 F.2d 1115 (5th Cir. 1982), *opinion amended in part, vacated in part*, 688 F.2d 266 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983); *Johnson v. Helmerich & Payne, Inc.*, 892 F.2d 422 (5th Cir. 1990).

Although the District Court maintained control of the proceedings below, it exercised its control evenly and fairhandedly among all parties, including its admonishments of counsel. In *United States v. Hawkins*, 661 F.2d 436 (5th Cir. 1981), *cert. denied*, 456 U.S. 991 (1982), the defendants made the same claim that Jatoi makes here, that is

that the trial court exhibited bias and interfered with their case through admonishments of counsel. However, the court refused to find that the trial court had erred where it "did not limit its admonishments to defense counsel as defendants contend, but chided the prosecutor on several occasions for various conduct." *Id.* at 450. The court also relied on the fact that most of the court's arguments with counsel took place during bench conferences, out of the hearing of the jury.

Jatoi sets out a string of citations to the transcript implying that Judge McBryde enforced the rule against repetitive and cumulative testimony unfairly and to the detriment of Jatoi. Petition for Writ of Certiorari 20-21. Actually, the transcript as a whole indicates that the Court's rule against repetitious and cumulative testimony was enforced with equal vigor as to all parties. *See* Tr.Vol. I-224-225; II-45,-104,-177-180,-187,-191,-293-295; III-283,-322.

This Court has denied certiorari even in a case in which the district court's conduct and remarks before the jury could have resulted in a litigant's counsel foregoing objection for fear of antagonizing the court and thereby prejudicing a client's case. *See, Miley v. Delta Marine Drilling Co.*, 473 F.2d 856 (5th Cir. 1973), *cert. denied*, 414 U.S. 871 (1973) (no error where trial court criticizes counsel's question to the extreme that "any five year old idiot knows that. Don't waste my time and the jury's time on that.") Here, even when admonishing counsel, the District Court was courteous and respectful to both the litigants and their counsel.

Assuming, *arguendo*, that Jatoi's counsel was in fact intimidated to the point that he was unable to adequately represent the interests of his client, Jatoi's remedy is not a new trial at the expense of Aetna and Amega, but rather a malpractice action against his former counsel.[5] The merits or demerits of an attorney's representation of his client in a civil action are not grounds for invalidating a verdict and any relief which a party may receive must come in a separate action for damages against his counsel. *Bury v. McIntosh*, 540 F.2d 835 (5th Cir. 1976), *reh. denied*, 543 F.2d 756 (5th Cir. 1976). The Fifth Circuit followed this view in *Pryor v. U.S. Postal Service*, 769 F.2d 281 (5th Cir. 1985) (plaintiff's remedy for his counsel's mistakes or omissions which led to dismissal of employment discrimination action for want of prosecution was to seek malpractice damages from counsel, not the granting of relief from the judgment). Here, Jatoi voluntarily chose his counsel and his sole remedy for what really amounts to an after-the-fact critique of his trial counsel by his new counsel is a malpractice action.[6]

Many of the complaints of Jatoi against his counsel have been the result of his inability to maintain a continuity of representation throughout these proceedings. Jatoi

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[5] In making this argument by no means does Aetna or its counsel intend to suggest that Jatoi's trial counsel committed malpractice. To the contrary, in light of the weakness of his client's case, the $150,000 settlement he obtained for Jatoi was an extremely favorable result under the circumstances.

[6] In fact, Jatoi has filed a malpractice claim against the firm of Decker, Jones, McMackin, McClane, Hall & Bates, in his counterclaim in an action brought by that firm for collection of fees from him.

is now without counsel after having six previous attorneys. The record establishes that no fewer than five counsel have previously represented Jatoi with regard to this dispute: Mr. Richard Trickey (Tr.Vol. III-257); Mr. William Peters (Tr.Vol. III-317-318); Mr. William C. Meier, prior counsel of record before this Court; Mr. James Curtis, counsel who tried the case, and Mr. Michael Mosher, counsel who filed the Rule 60(b)(6) Motion and Jatoi's first appeal to this Court.

Aetna and Amega should not be subject to further prejudice by a new trial where the true squabble, if one exists, is between Jatoi and his former trial counsel. Under these circumstances, Jatoi should not be allowed to escape the consequences of his voluntary settlement by means of a reversal of the Fifth Circuit's opinion dismissing the appeal. Justice cannot be served granting him the relief he seeks.

## II. THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT WAS CORRECT IN DENYING THE APPEAL OF JATOI'S RULE 60(b) MOTION AND SANCTIONING JATOI FOR FILING A FRIVOLOUS APPEAL SINCE THE BASIS OF THE MOTION WAS THE SUBJECT OF A PRIOR APPEAL

In his Petition for a Writ of Certiorari, Jatoi complains that the Fifth Circuit improperly dismissed the appeal of his Rule 60(b) Motion and, through the imposition of sanctions, violated his constitutional right to redress of grievances through the court system.

If the frivolous appeal of the judgment entered pursuant to a voluntary settlement itself is not sufficient grounds for the assessment of sanctions against Jatoi, the fact that the second appeal involved the same issues as the first clearly dictated that the Fifth Circuit's actions were appropriate. In fact, in the first appeal, the Fifth Circuit found that many of Jatoi's arguments were frivolous the first time they were made.

Just as he did in filing the second appeal (No. 91-7003), Jatoi raises the identical issues in this Petition for a Writ of Certiorari as he did in his first appeal (No. 91-1086) and in the appeal of Alcina Jatoi's Rule 60(b) Motion (No. 92-1057). Neither the sanctions imposed by the Fifth Circuit nor the threat of additional sanctions if another appeal was taken has had any effect on Jatoi. He has blatantly ignored both the warning and the sanctions in filing this Petition for a Writ of Certiorari.

Federal Rule of Appellate Procedure 38 gives the courts of appeal great latitude to award damages in the event of a frivolous appeal. In *Burlington Northern Railroad v. Woods*, 480 U.S. 1 (1987) this very court, citing the advisory committee's notes on the rule, stated that " 'damages are awarded by the court in its discretion in the case of a frivolous appeal as a matter of justice to the appellee and as a penalty against the appellant.' " *Burlington Northern R.R.*, 480 U.S. at 4. Accordingly, the Fifth Circuit Court has not hesitated to assess penalties against an appellant for prosecuting a frivolous appeal, including the assessment of attorneys' fees pursuant to Rule 38. *Foret v. S. Farm Bureau Life Ins. Co.*, 918 F.2d 534 (5th Cir. 1991); *Coghlan v. Starkey*, 852 F.2d 806 (5th Cir. 1988).

A case similar to this one is *Clarion Corp. v. Am. Home Prod. Corp.*, 494 F.2d 860 (7th Cir. 1974), *cert. denied*, 419 U.S. 870 (1974). That case, like this one, involved the second appeal by a stubborn litigant of a judgment entered pursuant to a voluntary settlement. As does Dr. Jatoi here, the appellant in *Clarion* claimed that the settled case had been mishandled by his former counsel. In noting that the case was the third appeal of the same issues, the court assessed sanctions noting that the appellant's course of action "has been frivolous and obstructive and has caused a shameful waste of judicial manpower." *See also, Trecker v. Scag*, 747 F.2d 1176 (7th Cir. 1984), *cert. denied*, 471 U.S. 1066 (1985) (assessing attorneys' fees and double costs as penalties against appellant's counsel for frivolous appeal, the second appeal in that matter).

Unfortunately, the Fifth Circuit's imposition of sanctions has done little to dissuade Jatoi from further appeal. To date, Jatoi has not even paid the sanctions awarded by the Fifth Circuit. Perhaps this Court's denial of the Petition for a Writ of Certiorari will, once and for all, put an end to the waste of time and money, not to mention judicial resources, suffered by the parties as a result of Jatoi's harassment. Therefore, Aetna respectfully requests that this Court specifically affirm the Fifth Circuit's opinion of July 21, 1992, awarding it $6,298.50 in sanctions against Dr. Jatoi for his blatant manipulations of the United States judicial system.

## CONCLUSION

The United States Court of Appeals for the Fifth Circuit was correct when it dismissed Jatoi's appeal and sanctioned him. Jatoi has had more than his fair share of opportunities to have his grievances addressed by the judicial system. On two occasions the Fifth Circuit reviewed the issues and the facts and found that the District Court acted properly during the trial and that the voluntary settlement entered into by Jatoi should stand. In dismissing the appeal, the Fifth Circuit quite appropriately found that the second review of the same facts and issues was enough. Respondent Aetna respectfully requests that this Court deny the Petition for a Writ of Certiorari and for such other relief to which the Court should find Aetna entitled, including specific affirmation of the Fifth Circuit's sanctions against Jatoi.

Respectfully submitted,

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Counsel of Record

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# APPENDIX A

# ALIMADAD JATOI, et al v. AMEGA CONSTRUCTION, INC., et al

July 1985 - Amega v. Alimadad & Alcina Jatoi and the Jatoi Partnership
236th Judicial District Court of Tarrant County, Texas

June 1987 - Jatoi files Third Party Claim v. Aetna

August 4, 1987 - Jatoi files Bankruptcy, Case Removed to Federal Court

April 15, 1988 - Withdrawal of Reference from Bankruptcy, Placed on District Court Docket

November 5, 1990 - Trial begins - US District Court, Northern District

NOVEMBER 7, 1990 - VOLUNTARY SETTLEMENT

NOVEMBER 8, 1990 - COURT ORDER ENTERED

| CASE NO. 1086 | CASE NO. 7003 | CASE NO. 1057 |
|---|---|---|
| 11/19/90<br>Motion for New Trial filed by Jatoi | 5/22/91<br>Rule 60(b) Motion Filed by Jatoi | 11/5/91<br>Rule 60(b) Motion filed by Alcina Jatoi |
| 12/17/90<br>Motion for New Trial Denied | 6/25/91<br>Rule 60(b) Motion Denied | 12/18/91<br>Rule 60(b) Motion Denied |
| 1/16/91<br>Appeal to Fifth Circuit | 7/1/91<br>Motion for Reconsideration filed by Jatoi | 1/15/92<br>Notice of Appeal filed in Fifth Circuit |
| 8/23/91<br>Fifth Circuit Affirms Denial of Motion for New Trial | 8/8/91<br>Motion for Reconsideration Denied | 4/23/92<br>Motion to file brief out of time Denied by Fifth Circuit |
| 11/18/91<br>Extension of Time to file Petition for Writ of Cert with Supreme Court Denied | 10/21/91<br>Notice that Record filed for Appeal | 7/23/92<br>Time to file Petition for Writ of Cert with Supreme Court Expired |
| E N D | 3/10/92<br>Brief filed with Fifth Circuit by Jatoi per extension of time | E N D |
| | 4/10/92<br>Motion for Dismissal and Sanctions by Amega & Benedict | |
| | 4/13/92<br>Motion for Sanctions by Aetna Ins. Co. | |
| | 6/30/92<br>Appeal Dismissed Jatoi Sanctioned | |
| | 11/92<br>Actual filing of Petition for Writ of Certiorari by Jatoi | |
| | 12/23/92<br>Sanctions Remain Unpaid | |

App. 1

# APPENDIX B

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December 10, 1992

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
NO. P088 395 628

Ms. Ruth Jones
Supreme Court of the United States
Office of the Clerk
Washington, D.C. 20543

Re: No. 92-898; Dr. Alimadad Jatoi, Dr. Alcina F. Jatoi and Jatoi Partnership v. Amega Construction, Inc. and Aetna Insurance Company; In the Supreme Court of the United States

Dear Ms. Jones:

This letter is in confirmation of our telephone conference on November 25, 1992 in the above-referenced matter. You will recall that the undersigned represents Aetna Insurance Company, a Third Party Defendant and Appellee. In that telephone conference, you indicated to me that the Court had accepted Dr. Jatoi's petition for a Writ of Certiorari with regard to only one of the appeals from the Fifth Circuit, that is Case No. 91-7003. It is my further

understanding that his petition was rejected as untimely as far as it attempts to appeal from the decisions of the Fifth Circuit Court of Appeals in Case Nos. 91-1086 and 91-1057. Therefore, it is only necessary for my client to respond to the aspects of Dr. Jatoi's petition which deal with Case No. 91-7003.

Finally, it is my understanding that Aetna's time for responding to Dr. Jatoi's petition will run from the date of receipt of Dr. Jatoi's Petition as redrafted to comply with Supreme Court Rules.

If the above does not meet with your understanding of the status of Dr. Jatoi's Petition, please contact the undersigned immediately.

Yours very truly,

Patrick J. Wielinski

PJW:kz

cc: Mr. Dan Vincinzo
Dr. Alimadad Jatoi
Aetna Insurance Company
Michelle I. Rieger (of the firm)